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LEGAL AND CONSTITUTIONAL RELATIONSHIP BETWEEN

CHURCH AND STATE IN ENGLAND

BY

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CONTENTS

PREFACE

At the present time of ecclesiastical controversy, and more particularly of so-called disorder in the Church of England, there are few subjects of greater interest to the public at large, and to Churchmen in particular, than that of the relationship of Church and State.

The Reports of the Royal Commission on Ecclesiastical Discipline (published in 1906) and that of the sub-committee of the Upper House of the Convention of Canterbury on the Ornaments Rubric (published in January, 1908) have tended to add greatly to this interest. They have brought the subject of Church and State in England still more prominently into general notice.

The object, therefore, of this treatise is to investigate and discuss in as impartial a manner as possible the following matters:—

(a) The main fundamental question of the true legal, historical and constitutional position of the Church of England, together with the three following subordinate questions which arise from it:—

(b) The present anomalies in the relative position of Church and State in this country,

together with the various irregularities in, and breaches of Ecclesiastical Law, which have arisen, directly or indirectly, from this anomalous position.

(c) In particular, those alleged breaches or neglect of the Law relating to the conduct of Divine Service in the Church of England, and to the Ornaments and Fittings of Churches, which have been dealt with by the Royal Commission on Ecclesiastical Discipline (appointed on April 23rd, 1904), and enumerated in their Report, dated 21st June, 1906. This Report really goes so completely into the whole subject of the relationship between Church and State in England, and the Commissioners' method of dealing with the subject of Ecclesiastical Discipline opens up the whole question so fully, that it has been thought necessary to deal with their Report very fully indeed. We therefore ask the reader's forbearance so far as these numerous (but to our mind necessary) quotations from that Report are concerned.

(d) The various suggested remedies for the present admittedly unsatisfactory and unfortunate state of affairs, in regard to the administrative, legislative, and judicial government of the Established Church in England.

We are far from fully sympathising with the extreme ritualistic party in the Church of England, yet we cannot fail to see that nearly all modern legislation on church matters, and judicial interpretation of Ecclesiastical Law, has been somewhat prejudiced against High Churchmen.

It is, moreover, a difficult thing to ignore

entirely the fact that the last Royal Commissioners have, unconsciously no doubt, laid themselves open by the wording of their Report to the suspicion of unnecessarily harsh judgment upon the extreme High Churchmen, and of leniency towards Low Churchmen. A notable example of this exists in their treatment of the question of the disregard of the rubric which provides for the public recitation of the Athanasian creed.

We hope that our opinion, on this point at least, will be considered free from prejudice, when we state that, on the whole, we consider that this particular creed, in its present form, is somewhat unsuited to public recitation in ordinary parish churches. We, however, consider ourselves churchmen of no extreme views, for whom an elaborate ritual has no overpowering attractions, and by whom vestments, incense and the like are regarded as non-essentials. The Commissioners, however, say that they are at a loss to classify the omission of the Athanasian creed, either as a significant or a non-significant breach of law.

Yet it seems quite impossible to contend, that in the absence of universal and long continued custom, the disobedience of a plain rubrical direction, to recite in the public services of the Church, one of the three great Formularies of our faith, is not a significant breach of law. The fact that individuals condemn, or even that public opinion condemns, such recitation, surely cannot alter the matter. Again, we have another example of the attitude of the Commissioners, in the fact, that the total omission of the ante-

communion service (which they admit is quite common in churches where evening Communions are celebrated) is classified by them as a non-significant breach of law.

Thus the usefulness of what might otherwise be regarded as a most able and exhaustive treatment of the subject they have in hand, by the Royal Commissioners in their Report, is somewhat discounted, when this suspicion of unnecessarily harsh judgment against the High Church Party, and of toleration towards Low Churchmen becomes so unavoidable.

Moreover, the omission of the Athanasian Creed is not an offence that an advanced high churchman would be likely to be guilty of.

Yet once again the Royal Commissioners show their outlook in the fact that all along they seem to have considered, that in order to review "the alleged prevalence of breaches or neglect of the Law relating to Divine Service in the Church of England, and to the Ornaments and Fittings of Churches," it has been necessary for them to sit in judgment upon advanced churchmen and ritualists and upon them alone. As a matter of fact, breaches of the strict letter of the law, and possibly of equal gravity, if not of equal numbers, have surely been committed by all classes of churchmen alike.

This is not meant to be a book of church law, neither is it intended to be a constitutional history of the Church of England. Yet at times we have felt a difficulty in confining ourselves strictly to the matter we have in hand, without needlessly digressing into matters of history.

It is, however, hoped that only so much strict law, and only so much actual history, have been introduced, as are strictly necessary for the purposes of argument, to support and work out the subject matter of this treatise. We also hope that it has been written in a style that all readers, clerical and lay, may alike read clearly and with interest.

The scheme of this book may for convenience and lucidity be stated as follows:—

An endeavour to show:—

(1) That the "Establishment" of the Church of England consists in the fact, that there exists between it and the State, a formal alliance in the nature of a quasi-contract.

(2) What the terms of that quasi-contract are, as truly interpreted in the light of constitutional history.

(3) The various breaches by the State of the terms of that quasi-contract.

(4) That almost without exception, every breach or neglect of law dealt with by the Royal Commission on Ecclesiastical Discipline, is traceable, directly or indirectly, to one or other of the breaches by the State, of the terms of the alliance between it and the Church.

(5) That the only permanently satisfactory solutions of the present anomalies would consist in (a) a restoration to the Church of the powers of self-government, thus wrongfully wrested from her by the State, and (b) a strict adherence in the future by the State, to the terms of its quasi-contract with the Church.

THE LEGAL AND CONSTITUTIONAL RELATIONSHIP BETWEEN CHURCH AND STATE

CHAPTER I

The nature of the Establishment of the Church of England, and the Prerogatives of the Crown rightly claimed in respect of it.

THE Church of England to-day is legally and historically continuous with that of the earliest times. This continuity is based on a regular succession of bishops from the days of the Apostles, unbroken even at the Reformation.

It is a co-ordinate branch of the Catholic Church, which recognises no authority outside the realm of England except that of a general council.

It is impossible to discuss the present position of the Church of England in regard to the State, without considering its history in some detail. This is so, because that present anomalous position is the direct outcome of its historical connection and dealings with the State.

Before doing so, however, we must first of all try and elucidate exactly what the practical, historical, legal, and constitutional meaning is of the "Establishment" of the Church of England.

First we note, that even as late as the reign of

Charles II., the Establishment of the Church of England included a good many things that are now no longer existing.

For example: Establishment then meant, that every person was bound by law, under heavy penalties, to conform to the Church of England; that every person was fined for absenting himself or herself from Church; that to speak against the Prayer Book was to become liable to imprisonment; that Dissenters who assembled for private worship were liable to still heavier penalties; that no schoolmaster could act as such without a bishop's license (under Canon 77); and that church rates were compulsory by law. All these things, however, happily no longer exist.

The Establishment of the Church of England to-day is something very different from this policy of tyrannous and compulsory conformity.

Secondly, we note, that when we say the Church in this country is established, we do *not* now mean, nor would we at any time have meant (as many people would appear to think), that its churches and parsonages have been built and endowed by the State, out of the public Exchequer.

This, on the contrary, so far as the building of the churches and parsonages is concerned, has all been done in the past, by private individual churchmen, or by sovereigns in their private capacity as sons or daughters of the Church. This is not by any means such a matter of common knowledge, as one might naturally suppose.

A large amount of these pious endowments of our forefathers was alienated from religious to

secular uses, in the time of the Tudors, such alienation being confirmed by Act of Parliament.

No corresponding endowment of the Church by Act of Parliament took place, either then or at any later date.

In regard to the endowments, these also, including all funded benefactions, have been the gift of churchmen in the past, and have nothing to do with the State. In so far, however, as these endowments consist of tithes (or their equivalent), the case is different. They no doubt can only be plausibly said to belong to the Anglican Church, so long as she remains the Established Church in this country.

Again the phrase "Established Church" does not mean, that out of several communities of Christians, the Government of this country has selected the present Church of England to be the official organ of the national religion.

Establishment furthermore does not mean that the Church of England is a department of the State, or a branch of the Civil Service. So when we speak, as we shall do, of the quasi-contractual alliance between Church and State, we do not mean that any strictly formal contract of this kind has ever been entered into.

The Church was founded in this country long before the nation as a nation existed at all.

As the present Archbishop of Canterbury has reminded us, there was an English Church before there was an English nation. The Church has taught the nation the rudiments of Liberty and of Literature. It was the English Church which gave

the English Bible to the English people, and which created our greater universities.

The Church has gradually Christianised the State, and moulded and formed it from its earliest infancy. The "Establishment" of the Church of England has not been founded (like that of the Presbyterian Church in Scotland) on any Act of Parliament or formal document, but by the gradual assimilation of the Church into the national life.

There does exist, however, as the gradual product of centuries of co-operation and identification between Church and State, something in the nature of an unwritten contract or alliance between the two. The terms of that quasi-contract are, when closely studied, none the less definite in theory, because it is an unwritten one. The Church is part of the national life, and her constitutional position is inherited from the remotest times of English History.

When, therefore, we say the Church is Established, we do mean that there exists between the Church and the State in England a formal alliance *in the nature of* a quasi-contract. We should much like to use the simple word "contract"; but the whole matter of the relationship of Church and State is somewhat obscure and controversial, and the word "contract" is such a technical legal term, that we prefer to use the less technical words "alliance" or "quasi-contract." Under this alliance, or quasi-contract, which has gradually been clearly evolved and defined in the course of history, each of the two contracting parties has clearly defined rights and obligations.

These rights and obligations have at different times been all clearly defined. They have, however, subsequently, as we shall show, been considerably obscured, and partially lost sight of, through the somewhat arbitrary action of the State on different occasions. To speak with greater definiteness we say, that under this quasi-contract, the Sovereign, as supreme head of the State, has certain prerogatives over the Church. The Church, on the other hand, has certain privileges which may or may not be of much real and practical value to her. We shall take both in order, the latter first. We do not of course include among the privileges of the Church of England such matters as the exemption of her buildings from rates, and the non-liability of her clergy to serve on juries—these are equally claimed and shared by all non-established Christian communities.

These latter privileges,—omitting certain minor matters, such as the holding of Government Chaplaincies, the crowning of the King or Queen (by Statute 1, William and Mary, c. 6, sec. 4) and the fact that the reigning Sovereign must be a communicant of the Church of England (Act of Settlement 12 and 13, William III., c. 2, sec. 3), which are privileges of the Established Church,—exist mainly in the following facts:—

(1) Many of the Bishops of the Church of England are members of the House of Lords, and as such, are hereditary members of the State Legislature. They, however, now in practice, confine their active participation in the work of the Upper House, to matters which, directly or in-

directly, affect the Church whose representatives they are. Moreover, they sit strictly, not as bishops of the Church, but as barons by writ. We shall deal with this point in the next chapter, and endeavour to shew this is a matter of strict right, rather than of mere privilege.

(2) In all rural parishes existing before the passing of the Tithe Commutation Act of 1836, there exist money payments, called tithe-rent-charge due to the incumbent instead of the old tithes. These are recoverable through process of law by the Tithes Act of 1891 from the owner of the land. They may be regarded as a form of endowment, which belongs to the Anglican Church, only so long as she continues to be the Established Church of the country.

The system of tithes was adopted by the Christian Church from the Jewish system as early as the 4th or 5th century. After the earlier ages of the church the principle of tithes as a tenth part of every man's income passed away and only such income became tithable as was derived from those things which yield a yearly increase by the act of God, such as crops and live stock. Thus most people became exempt from the direct operation of the law of tithes.

This inconvenience of collecting tithes often led to a voluntary system of agreement between clergy and tithe payers, by which the former received a fixed annual payment in kind or money instead of the actual tenth. These agreements were recognised by law as soon as sanctioned by custom, in

accordance with a well-known principle of English Law.

The voluntary system of commutation was superseded by the Tithe Commutation Act of 1836 by a rent charge which varied each year with the price of corn.

(3) All the Officials of the Church of England are recognised as such by the Secular Authorities.

(4) All the Law of the Church of England is the King's Ecclesiastical Law, and so is part of the Law of the Realm.

(5) As a natural corollary to (4), the various ecclesiastical courts are officially recognised as part of the Judicature of the State; their decrees are recognised as valid by the State, and they can be enforced (if necessary) by the power of the Secular Arm. In the case of non-established churches or Christian communities, the decrees of their courts rest, of course, on spiritual sanctions only.*

The legal authority for the enforcement of the judgments of the Courts of the Established Church consists in the following enactments:—

By Statute 53, Geo. III., c. 127, sec. 3, it is provided, that a person, against whom a sentence of excommunication has been passed by an ecclesiastical court, shall be liable to such imprisonment, not exceeding 6 months, as the Court pronouncing such excommunication shall direct.

By sec. 1 of the same statute, any person who refuses to obey a decree of an ecclesiastical court,

*Long v. Bishop of Capetown (1 Moore's P.C. Cases. N.S. 411).

is treated as contumacious, and guilty of contempt of one of the King's Courts, and liable to imprisonment, under writ "de contumace capiendo," until he makes submission.

The principle on which the State interferes is as follows:—

The civil courts have no jurisdiction in ecclesiastical offences, or to impose ecclesiastical penalties, but when the church court has tried the case and found an offender guilty, the Civil Power will enforce the judgment if necessary.

The practical advantage of this is very questionable, it would seem that ecclesiastical courts should rest on spiritual authority and spiritual sanctions alone. Christ's command is that the extreme penalty should be the purely spiritual one of excommunication; "If he neglect to hear the Church, let him be unto thee as an heathen man and a publican." Matt. xviii., 17.

So much then for the privileges of the Established Church in England. We shall now discuss the prerogatives of the Crown over the Church. First of all we notice that, of course, quite apart from any quasi-contract between Church and State, there is an inherent and absolutely undisputed right vested in the Crown, and exercised rightly through Parliament, to legislate in regard to the temporal property of the Church, and to have the allegiance of all the subjects of the State, both as churchmen and as citizens.

These, however, hardly come under the head of royal prerogatives strictly so-called. We shall deal with them briefly now.

The State protects churchmen in the enjoyment of their ecclesiastical property, and has the right to compel them to only deal with such property, in accordance with the ordinary secular law in regard to property in general.

In this respect the Church is precisely in the position of all other Christian communities in the State, not established or formally united to it, with one single difference. In the former case the matter would come before a church court, which would be ultimately bound by the ordinary secular law of property, and in the latter cases, the matters would come before the Civil Courts, and be judged according to secular law at the outset.

Temporal property and temporal rights are matters which the State has a right to deal with in whatever way it chooses. So long of course as the State confines itself strictly within the limits of its jurisdiction in regard to the ownership of temporal property, the members of the Church have no more right, legal or moral, to disobey, than have any other members of the community.

All subjects of the Crown are alike under the protection of its laws, and must obey them in regard to all matters which, like temporal property, rightly come under their cognizance.

It is only when the State seeks to exercise jurisdiction, and to usurp the powers of legislation over the Church in regard to spiritual, doctrinal or ritual matters, that Churchmen would seem to have a moral right to refuse obedience.

The question of allegiance requires no discussion. With these preliminary remarks we say,

that the rights claimed by the Sovereign over the Church may easily be divided into two classes.

(a) Those which are validly claimed as strictly provided for and agreed to by the Church as being in accordance with the terms of her alliance with the State.

(b) Those which have been at various times usurped by the Crown, and either exercised directly by the Sovereign in person, or delegated by him to Parliament or to his ministers of State. We shall deal with these latter in the next chapter.

We hope to show, moreover, that practically all the present disorders in the Church of England are traceable to the usurped and disputed powers which come under class (b).

Before taking class (a) in detail we shall deal first with the meaning of the Royal Supremacy in General.

The Royal Prerogatives (or the Royal Supremacy) over the Church depended upon two main principles:—

(1) The King was as Head of the State viewed from its spiritual side the recognised Champion of the Church against the Pope, her Supreme Head and her eldest son. This covered all the Prerogatives so-called.

(2) The King must govern all his subjects properly, both as members of the Church, and members of the State, that is, he is Head of the State as a whole.

These principles may be traced in the ecclesias-

tical legislation of the earliest Kings of England as far back at least as King Alfred. In particular, Convocation in 1531 recognised Henry VIII. as Supreme Head of the Church and clergy "as far as is allowed by the law of Christ." This recognition of Supreme Headship was confirmed by Parliament in 1534 by statute (26, Henry VIII., c. 1) in the terms "only supreme head on earth of the Church of England." This statute was of course aimed at the usurpations of the Popes, and in stating that the King was the Supreme Head of the Church, it merely recognised the old constitutional position of the King of England as Champion and Head of the Church. It also asserted the *visitatorial* jurisdiction of the Crown, which is constitutionally involved in the Royal Supremacy. It may possibly be contended, that the wording of this statute in regard to the visitatorial jurisdiction of the Crown is too ambiguous to be of much value as historical evidence of the nature of such jurisdiction. This, however, is of little importance as the Act was repealed, in 1554, by statute 1 and 2, Ph. 1, M. c 8, and the Royal Supremacy, in regard to its visitatorial rights over the Church, now rests upon the Elizabethan Act of Supremacy, 1559. Elizabeth left the Supreme Head Act repealed, because the title "Supreme Head" was likely to cause discontent, and was liable to abuse, as suggesting one who exercised spiritual authority. By the Act of 1559 she put the visitatorial jurisdiction of the Crown under the administration of a new Court, the Court of High Commission, and

by the same Act defined the constitutional meaning of the Royal Supremacy, being careful in this connection to show that it included no spiritual jurisdiction whatever. Briefly the Royal Supremacy was defined as the right of *supervision* over the administration of the Church, which is vested in the Crown, as Head of the State in order to provide for the religious welfare of the people. No suggestion was made in this statute, that the Crown has any right to exercise spiritual jurisdiction, but merely a general visitatorial jurisdiction, described (in sec. 17) as being only "for the *visitation* of the ecclesiastical State and persons, and for reformation, order and correction of same, and of all manner of errors, heresies, schisms, abuses, offences, contempts and enormities, etc."

This latter sentence, of course, does not mean that the Crown was itself to decide, either in person or through the secular courts, what constituted such errors, heresies, etc. The Church synods and courts were retained with all their former power, and this fact surely shows that they were to continue to decide such matters.

In reality the Royal Supremacy has been, as we read in Wakeman's History of the Church of England (6th Edition at p. 322), "mainly an assertion of national self-government against the encroachments of the Pope as a foreign power, which claimed to have rights, by virtue of its own prerogative, over Englishmen . . . . At the Reformation entire national self-government was asserted, and the supremacy of the Crown became

the means whereby the nation resisted all claims of interference on the part of Pope . . . The oath of Supremacy *was not so much an acknowledgment of Kingly power as an assertion of loyal patriotism.*"

Thus we see, that the general visitatorial jurisdiction of the Crown over the Church is a historical constitutional outcome of the former of these two main principles, i.e., that the King had always been the recognised Champion and Head of the Church, whether it has been against the encroachments of the Pope of Rome or of any other outside authority, e.g., Parliament. We have an example of the latter in the reign of Queen Elizabeth, when the Crown refused absolutely to allow Parliament to interfere with the Church.

The rights to legislate in regard to the temporal property of churchmen, and the right to their allegiance, are obviously traceable to the second of these principles, i.e., that the King is Head of the State as a whole.

So much for the principles upon which the Royal Prerogatives are based. By the terms of the formal alliance between Church and State, which has gradually become fixed and defined in the course of history, the latter recognises the Officials, the Courts, and the Legislature of the former as parts of the national constitution. In return it claims the general visitatorial rights above mentioned, which constitute the Royal Prerogatives strictly so-called.

Those rights consist of (a) the right to control the Legislature of the Church; (b) the visitatorial

right to control the Ecclesiastical Courts, and (c) the right to appoint bishops.

We shall now discuss these in order.

(a) The right to control the Legislature of the Church :—

The Crown claims two rights over the free synodical action of the Church, as follows, which are both accepted as constitutionally valid :—

(1) That (like Parliament) the Convocations cannot meet without the Royal license.

(2) That their canons cannot become operative without being confirmed by the Crown.

These claims are strictly historical. William the Conqueror (as the historian Eadmer tells us) would not allow the Synods of the Church to enact anything that he did not himself approve of.

Eadmer also relates that Anselm felt himself bound to acknowledge that the Synods could not even meet without the royal sanction.

Later on we find, that in the reign of Edward I., when Archbishop Peckham on two separate occasions caused his provincial synod to enact canons which the King did not like, the latter compelled the Archbishop to revoke them.

The royal power of veto upon ecclesiastical legislation was thus historically claimed and established in *general* terms. We find, however, the matter finally settled in *particular* terms, in the reign of Henry VIII. First of all there is the "Submission of the Clergy," a document in which the latter admit that Convocation had always been, and always must be, assembled only by the King's "high commandant or writ."

Secondly, this document was confirmed by the Statute 25, Henry VIII., c. 19, the Act for the Submission of the Clergy. Moreover, the same constitutional Royal Prerogatives are formally stated in the Royal Declaration, which was prefixed to the 39 Articles of Charles I.

However arbitrary the enforcement of this claim to the Royal Veto on ecclesiastical legislation may have been at different periods in history, and particularly during the reign of Henry VIII., it has never been seriously contested. It moreover has now been acquiesced in by the Church so long, that it must be taken as being strictly constitutional, and one of the terms of the quasi-contract between Church and State. It puts Ecclesiastical Canons in many respects on a par with Parliamentary Statutes; with this great difference, however, that whilst neither Parliament nor Convocation can legislate without the royal permission, yet in theory, the King *enacts* a statute, with the advice and consent of Parliament,—whilst he only *confirms* a canon, after Convocation has promulgated it.

(b) The visitatorial right to control the Ecclesiastical Courts.

The Crown, we have pointed out, recognises all the Ecclesiastical Courts, including, of course, the Bishops' Courts as part of the national Judicature.

The Crown also gives the Bishops power to exercise jurisdiction within a certain area, and this each bishop exercises, through the Judge of his court.

It is an established constitutional principle that the Crown is the source of all jurisdiction exercised by the Courts of the realm, civil and ecclesiastical alike. Thus, strictly speaking, the ecclesiastical courts receive their power from the Crown.

This of course does not mean that the Crown confers any *spiritual* jurisdiction upon the Church Courts, any more than the appointment of bishops by the Crown means that spiritual authority is conferred on the Bishops by the King. It does however mean, that the law administered by the Church Courts, which are courts of the realm, is part of the law of the land, the "King's Ecclesiastical Law." It can thus be enforced by sanctions, other than the spiritual sanctions which these courts possess, i.e., by the Secular Arm, as an exercise of the Royal Supremacy. In this sense then the Church Courts derive jurisdiction from the State.

Moreover the Church Courts in some cases give decisions which affect temporal property.

These decisions must be subject ultimately to the general law of the land, in regard to property in general. Thus in a double sense, Church Courts are under the control of the Crown. This control, therefore, even in cases wholly of a spiritual nature, definitely exists, but can only be exercised within the recognised constitutional limits.

That is to say, the Civil Courts (i.e., the Secular Courts strictly so-called, as distinguished from the Judicial Committee of the Privy Council which is a civil, i.e., a non-ecclesiastical court only so far

as its actual judges are concerned, but strictly an ecclesiastical court) cannot rightly claim to interpret the King's Ecclesiastical Law. That is the function of the Ecclesiastical Courts alone. Nor can the Civil Courts hear appeals from the decisions of the Ecclesiastical Courts.

They can, however, quite rightly claim, and do so claim, to review their judgments upon "prohibition" and by way of appeal "tanquam ab abusu."

This visitatorial jurisdiction is mere supervision and nothing more. It is for the purpose of seeing that the Church Courts do not exceed their jurisdiction as constitutionally defined, nor violate the ordinary law of the land in exercising their lawful jurisdiction. It is worthy of notice that in the case of Mackonochie v. Lord Penzance (L.R. 6, A.C. 424) the principle was distinctly laid down that the temporal courts will not interfere with the Ecclesiastical Courts by way of prohibition in matters of practice and procedure, but only when it is shown that the particular ecclesiastical court has exceeded its jurisdiction. Incidentally, also, the case of Allcroft v. Bishop of London (1891, A.C. 666) supported the same principle.

The Civil Courts can also claim, and do also rightly claim, the right to compel the Church Courts, by writ of "mandamus," to exercise their jurisdiction, if it be wrongly withheld.

These alone are the true prerogatives of the Crown over the Ecclesiastical Courts.

On the other hand all claims to hear appeals from the decisions of the latter on any matters

whatever, except in the ways above indicated, or to hear ecclesiastical cases in the first instance, are wrong and unjustifiable.

(c) The right to appoint the Bishops of the Church.

The State claims, as a further exercise of the Royal Supremacy, the right to nominate the Bishops, and that its nominees must be both elected by the Chapter, and confirmed by the Metropolitan, as a matter of course. This claim must be regarded as one of the terms of the quasi-contract between Church and State, provided only it be exercised in the recognised constitutional manner.

It again is strictly historical, and inasmuch as several of the Bishops are Privy Councillors, and sit in the House of Lords, it has never been seriously contested that there is justice in the claim of the Crown to have *some* voice in the selection of the Bishops. In practice, the claim of the Crown to have practically the *whole* real nomination of the Bishops has also been acquiesced in for generations, and must now be regarded as established permanently.

The historical growth of this claim was somewhat as follows:—The Christian Emperors successfully claimed and exercised the power of approving or disallowing the episcopal elections in the early Church. The feudal sovereigns secured the same power, and the process was simplified by converting the episcopal possessions into feudal fiefs, which were conveyed by the investiture of the Bishop by the King with the Staff and Ring.

In England the earliest elections of the Bishops were made by the Witan or national council, in days when the leading clerics and laymen were alike members of it, and the distinction between Church and State was quite unknown. Nomination by the King seems to have become gradually a more and more important factor.

Later on, just before the Conquest, the Bishops were appointed by agreement between the King and the Chapter in each case.

By the middle of the 11th century, a formal nomination by the King had become necessary to put the Bishop-designate in possession of his temporalities. The Church, however, of course conferred upon him his spiritual powers by consecration, as she had always done. There had never been, of course, either then or at any subsequent date, any claim by the Crown to confer these purely spiritual powers. Those rights, however, which were technically known as the "Spiritualia beneficii," and which the Bishops acknowledged in their oaths of allegiance as being held from the Crown, being really included in the temporalities of the sees, were quite another matter. They are quite distinguishable from the purely spiritual rights conferred by consecration, and so were conferred by the Crown, under its feudal authority from early times, by the investiture with staff and ring.

So soon, however, as the insignia of a bishop's office, the Staff and Ring, were looked upon as symbols of his *spiritual* authority, churchmen were

opposed to their being given to the Bishop by ceremonial investiture by the King.

Anselm, moreover, succeeded in inducing Henry I., to surrender his claim to confer these insignia of spiritual authority (as they were now regarded) on condition that he still received the homage of the Bishops-elect, and retained the right to confer the temporalities of the Sees, including the "Spiritualia beneficii."

Henry I., moreover, compromised the question of the election of the Bishops, which the Cathedral Chapters now claimed for themselves, by agreeing that the Chapters might be permitted to make free elections, if they performed them in his presence.

Out of this arrangement Henry II. produced the law contained in his 12th Constitution of Clarendon. By this the King was to nominate the candidates, from whom the election was to be made by the Chapter, subject to his consent.

This, of course, was a pure example of tyrannous usurpation, and was considerably modified in practice by King John, who left the election wholly to the Chapters, subject, however, to the royal license and approval.

The Popes, shortly after the reign of John, obtained the election of the Bishops by their encroachments. The device adopted was, that they claimed to hear disputed elections as a part of their general appellate jurisdiction. Then they gradually asserted the right to reject both rival claimants and nominate their own candidate. Still later, they claimed to confirm *all* episcopal

elections. Finally in the 14th century, they claimed the direct appointment of all the Bishops. Thus the right of the clergy to a share in the election of their bishops became once more, as it had been before under Henry II., a mere empty form.

The Kings agreed for a time to these papal claims, and the practice was for the King and Pope to agree upon a candidate, who was nominated by the King in the "letters missive," a document which accompanied the "conge d'elire," or royal license to the Chapter to elect. Such an election of course was an election only in name, being compulsory.

The great schism in the Papacy next enfeebled the papal claims, and in 1416, when there was no Pope recognised in this country at all, three bishoprics were filled by capitular election alone.

The recovery of the Papacy enabled the Pope to renew the old method until the Reformation, when Henry VIII.'s breach with Rome finally put an end to the Pope's share in the election of English bishops. The King now claimed the sole right of actual election himself, and exercised it, if the Chapter refused to appoint his nominee, by letters patent, appointing the rejected nominee, without further formality. Now, of course, letters patent are only used to appoint the bishop of one of the more modern sees, in which there is no Chapter which can elect him, and also in the case of suffragan bishops.

Furthermore, Henry took over, in addition to

the powers heretofore enjoyed by the Crown, some of those wrongfully usurped in previous years by the Pope; leaving the clergy again with a power which was no power at all, viz., the bare right of confirming the King's appointment by so-called election. For example, it had been the custom, from the earliest times, when a bishop was elected, to have his election "confirmed" by the Metropolitan, a ceremony by which the latter gave him spiritual jurisdiction over his see, in the name of the whole episcopate.

This power had been usurped by the Popes, together with the right of conferring upon the newly-elected bishop the temporalities of his see. Both these powers were taken from the Papacy at the Reformation, and rightly so, but the tendency of Henry's policy was, not only to recover those rights to which the Crown had been before entitled, but also to draw into his hands some of the powers usurped by the Pope.

Thus we find that sec. 4 of 25 Henry VIII., c 20 (repealed by 1 Edward VI., c 2, but re-enacted by 1 Eliz., c. 1) provided, that after the election of a bishop by the Dean and Chapter, the King should signify the election to the Metropolitan, "*requiring and commanding* him to confirm the said election, and to invest and consecrate the said person so elected, to the office and dignity that he is elected unto." This duty, moreover, an archbishop is bound to perform, without discussing the fitness of the person appointed. (R. v Archbishop of Canterbury, 1848, 11 Q.B. 483, and R. v Archbishop of Canterbury, 1902, 2 K.B. 503). In this

latter case Lord Alverstone, C.J., spoke as follows: "The question primarily depends upon the true construction of the Act. 25 Henry VIII. c 20. . . . There is, in the statute, no mention of any examination or inquiry by the Archbishop, but he is directed to confirm the election within a period of 20 days. Nor does the statute on the face of it, in terms contemplate, or directly or indirectly suggest that the Archbishop can in any way question the fitness of the person nominated by the Crown."

This statute still governs the matter, not only of the confirming of bishops, but also of their appointment. By its provisions, Letters Missive are still to be sent from the Crown to the Dean and Chapter of the vacant see, containing the name of the King's nominee, who *must* be elected by the Chapter. This branch of the Royal Prerogative, like that of the Royal Veto on the legislative action of Convocation, may perhaps also have been wrongfully forced upon the Church by the Crown. It has, however, been agreed to for many generations now by the Church, and is thus also indisputably now a term of the quasi-contract of establishment.

This nomination of bishops-elect is of course nomination and nothing else, there is no question of conferring spiritual authority by the Crown.

The Archbishop does this under 25 Henry VIII. c. 20, at the King's command.

In practice nowadays, the bishops are chosen by the Prime Minister, presumably after consultation with the spiritual leaders of the Church.

It is, however, an implied condition of the exercise of this prerogative of the Crown, that only fit persons shall be so nominated.

In cases of suffragan bishops, or where bishops are elected to new sees in which there is no Chapter to elect them, i.e., in all cases where the Crown's nominee is appointed at once by Letters Patent, there is no formal confirmation by the Archbishop.

CHAPTER II

Prerogatives of the Crown wrongfully claimed over the Church as coming within the terms of her Establishment.

WE now pass on to review Class B, those so-called prerogatives of the Crown, which have at various times been usurped by the Crown, which are still claimed and exercised by the Secular Power, and which have (unlike the powers over Convocation and the Bishops claimed under 25 Henry VIII., c. 19, and 25 Henry VIII., c. 20) not been acquiesced in by churchmen sufficiently long to entitle them to rank among the terms of the Establishment of the Church.

Taking them in the same order as before, we have:—

(a) usurped powers over the Legislature of the Church,

(b) usurped powers over the Church Courts, and

(c) usurped powers in regard to the appointment of the Bishops.

(a) The State has now, for many years past, claimed, in addition to the Royal Prerogative of

Veto on ecclesiastical legislation, the right to override the legislative authority of the Convocations altogether, and legislate for the Church through the secular parliament. This is a direct violation of the right of the Church to self-government.

Some of the results of this particular injustice we shall deal with later on.

Meanwhile, to support the statement that it is an injustice, and to show that the Convocations (though, as at present constituted, they are far from being ideal representative assemblies) are the sole constitutional and historical legislature of the Church of England, it is necessary to give a review of their growth and history.

From the time of Archbishop Theodore the Spirituality of this country have met in archidiaconal, diocesan and national synods, practically free from State interference (except as indicated above, in regard to the policy of William the Conqueror and Edward I.). Provincial Councils or Synods met occasionally, but not regularly until the 13th century.

As these latter grew in importance, the National Synod fell more and more into disuse, and finally became a rare legislative council, presided over by the Pope's representative.

The last national synod was summoned by Cardinal Pole in 1553, but no fewer than 33 such national synods had been called together during the 250 years which followed the Conquest. Since 1553, however, the only attempt at a national synod which has taken place, was in the year 1661, when the province of York sent proxies to represent it,

during the revision of the Prayer Book by the Southern Province.

It may thus be fairly stated that the National Synod of the Church of England has long ceased to have any practical existence. On the other hand, the provincial synods or convocations have had a continuous co-ordinate existence and activity, from the time of Theodore to the present day. That continuous existence has only once been broken, when in 1717 George I., by an absolutely unjustifiable exercise of what he conceived to be the Royal Prerogative, suppressed the Convocations of the Church, after 11 centuries of regular and efficient synodical action. They were not in practical existence from that date, until their revival in 1850.

So much for the existence of the Convocations. Now a few words to explain their constitutional position and powers. To do so we must digress a little from our main subject.

It is an undisputed fact, that one of the elements out of which Parliament has grown was the Great Council, the "Magnum Concilium" of the Realm. Of this the Archbishops and Bishops were *all* regular members, because, as the Constitutions of Clarendon clearly shew, they all, from the time of the Conquest, had held their temporal estates by feudal tenure from the King. Also because many of the more prominent of their number were, from time to time, among the King's chief regular advisers. Therefore we note that, as a matter of history, those of our bishops who now sit in the House of Lords do so, not necessarily as ecclesias-

tics, but because their predecessors (equally with those of the Lords temporal, who are barons by writ, as distinguished from barons by patent) were originally feudal barons. They were there originally, not as bishops, but as tenants-in-capite. The bishops, therefore, would seem to have as much right to their seats in the House as the representatives pro. tem. of their episcopal lands, as the temporal barons by writ have. All alike found their claim, as a matter of history, on the feudal tenure of their land. The matter of the bishops being members of the House of Lords is thus one of right, rather than of mere privilege. Moreover, the clergy of the Church of England, unlike dissenting ministers, cannot sit in the House of Commons. This again in quite another way strengthens their claim to have representatives in the Upper House, not as a matter of privilege, but one of strict right.

During the 13th century Parliament, as then constituted, i.e., the "Magnum Concilium" aforesaid, was strengthened for the first time by the addition of certain elected representatives of the nation.

This was the result of the policy of Edward I. These elected representatives consisted of both clergy and laymen. The Bishops and the Heads of religious houses had already been summoned, in their own right as the King's tenants-in-capite, i.e., his feudal vassals. The minor clergy were now allowed to elect proctors to represent them.

Edward I. wished to treat the clergy as a separate Parliamentary estate, and so combine

civil and ecclesiastical representatives in a "commune concilium" of the whole nation, incorporating the existing synods with Parliament, of the Upper House of which the Bishops and Abbots were already members.

This would have been quite in accordance with the precedent of the mixed councils of Church and State in the Saxon times.

The main object of this plan was, of course, to obtain money grants from the estates of the clergy.

They, however, were jealous of their privileges, and refused to have their Convocations thus merged into Parliament. They insisted upon giving their money grants through their Convocations, sitting apart from Parliament.

This right of self-taxation, thus successfully vindicated, was never lost, until the year 1665, when it was voluntarily surrendered by agreement between the then Archbishop of Canterbury and the then Lord Chancellor. Ever since this date the clergy have paid the ordinary taxes levied by Parliament.

The clerical estate in Parliament thus gradually died out, and finally came to an end early in the 15th century. Since then no churchmen have sat in Parliament as such, but of course some of the bishops retain their position as peers of Parliament, and sit in the House of Lords.

The clergy thus, by their determined action, ensured that Convocation should be always summoned at the same time as Parliament, but as a separate and distinct body.

It had, in addition to the function of self-

taxation (to exercise which the King really summoned it) and its ordinary spiritual functions as the synod of the Church, in the way of legislating on spiritual matters, that of initiating Parliamentary legislation by means of petitions to Parliament.

The independent existence and privileges of the Convocations were thus successfully vindicated and always recognised.

During the 13th century the Convocations assumed their present form. In early times all the Bishops were members, but the priesthood was only represented by those who were in personal attendance on the Bishops. During the reign of Edward I. a regular system of representation appeared in Convocation, similar to that which grew up in the Secular Parliament. The inferior clergy in Canterbury were represented by two elected proctors from each diocese and one from each cathedral and collegiate chapter.

These representatives, with the Bishops, Abbots, Priors, and Deans, made the provincial synod or Convocation, and the synod of the Northern Province was similarly constituted.

The membership and constitution of the Convocations have remained unchanged from this form down to the present day, with this difference only, that at the Reformation the representatives of the religious houses were excluded.

Their organisation, however, is now different. In former years each synod sat as one body, whereas towards the end of the 14th century, the Bishops separated themselves and formed the

Upper House, leaving the inferior clergy to deliberate by themselves as the Lower House in each case.

The Act for the Submission of the Clergy, which was passed in the reign of Henry VIII., seriously limited the powers of Convocation in regard to legislating for the Church.

It put Convocation almost on a par with the Secular Parliament in regard to legislation. Under it "the Royal Commandment or Writ" is essential for the meeting of Convocation, and all canons must receive the Royal Assent to be constitutionally valid. This enactment did not, however, *in any way contradict* the claim of Convocation to be the sole legislative body for the Church, nor does it, in any particular, justify the modern practice of the Secular Parliament initiating legislation for the Church.

In reality the statute of Henry VIII., as a matter of principle, gave the Crown very little more power over the Church than that claimed by the Norman Kings before the Papal usurpations supplanted it.

Moreover, the practice of the State legislating for the Church through Parliament is clearly shown to have been considered unconstitutional by Queen Elizabeth. This Sovereign, on several occasions, refused to allow Parliament to usurp the legislative powers of Convocation.

In the reign of James I. Convocation framed a number of Canons (141), which have been declared, on the highest legal authority, that of Lord Hardwicke in the case of Middleton v. Croft

(1736, 2 Atkyn's Rep. 650), to be binding "proprio vigore" on the clergy; and on the laity also, so far as they come within the scope of their jurisdiction.

Charles I. prefixed a declaration to the 39 Articles to the effect, that if any differences should arise "about the external policy concerning Injunctions, Canons, or other constitutions whatsoever thereto belonging," the *clergy in Convocation* should deal with them, having first obtained the King's permission. It also contained a promise that the Bishops and clergy should be given license, from time to time, to "deliberate of and to do all such things as shall concern the settled continuance of the Doctrine and Discipline of the Church."

The 17 Supplementary Canons of the year 1640 were never confirmed by Parliament, yet they are constitutionally valid without such confirmation, being again good "proprio vigore," as far as the clergy are concerned.

Finally, we notice that a verbal slip in the last revision of the Prayer Book, in 1662, remained uncorrected until the House of Lords was assured by three of the Bishops that they had authority *from Convocation* to amend it.

These facts, we contend, show the constitutional Legislature of the Church to be Convocation alone, and that Ecclesiastical legislation, promulgated by Convocation, is valid *proprio vigore*, and has full spiritual validity without consent of King and Parliament.

The Royal Assent is, however, necessary to make

it part of the King's Ecclesiastical Law, to be enforced by the King's Ecclesiastical Courts as part of the national Judicature.

The matter of confirmation by Parliament of ecclesiastical legislation seems, from the churchmen's point of view, somewhat unnecessary.

We now proceed to deal with the unfortunate practice of modern times of the State legislating for the Church through Parliament, which is the particular violation by the State of the quasi-contract of Establishment, which we now have under discussion.

This is neither right nor harmless, yet it has undoubtedly grown out of false constructions put upon the Act for the Submission of the Clergy. For this unfortunate statute, though perfectly valid even from the Church's point of view, through usage and acquiescence by the Church, had one mischievous result. It made the existing Canon Law part of the law of the land, by Statute and not as before by Custom.

Thus none of it could be altered, except by Act of Parliament. By it the Church was to continue to be governed by Canon, as the State was and is governed by Statute, and the Royal Assent was to be essential to each form of legislation. In the same way Parliament and Convocation were alike to be assembled by Royal Writ.

This mischievous result of 25 Henry VIII., c. 19 had the two following even more mischievous corollaries attached to it,—

(1) An impression arose that no Ecclesiastical Canons had any validity, unless they were incor-

porated in the Statute Law of England, whereas they really are spiritually valid "proprio vigore."

(2) The unjustifiable opinion and practice arose that an Act of Parliament, in regard to the affairs of the Church, becomes at once a part of the King's Ecclesiastical Law, without any reference to, or consideration and approval by, Convocation.

Nothing more unhistorical and unjust can well be imagined, for even if such an Act of Parliament were afterwards confirmed by Convocation, this would still be a complete reversal of the true order of procedure, still a usurpation of the legislative powers of Convocation. Not only can ecclesiastical legislation never rightly *take its origin* in an Act of Parliament, but further, an Act of Parliament is not wanted, so far as the Church is concerned, to complete such legislation, when promulgated by Convocation in the first instance.

In spite of all this, it is a fact that during the years that followed this statute of Henry VIII. much legislation was done in Parliament which should have been done in Convocation. Moreover, with the notable exceptions of the Canons of 1603, most of the ecclesiastical legislation of the country since 1534 has been, quite needlessly, embodied in an Act of Parliament.

During the 135 years that Convocation was kept in abeyance more legislation was carried out in Parliament for the Church, all of which obviously could not be referred to or deal with by Convocation.

Finally, as time goes on, the amount of legislation of this kind is steadily on the increase;

legislation which, we again assert, is a violation of the rights of the Church to govern herself and legislate for herself.

Important measures dealing with ecclesiastical matters have of late years frequently been promoted in Parliament, without Convocation being consulted in the matter at all.

When Mr. Gladstone prefixed to the schedule of his Burials Bill a reference to Convocation, it was withdrawn in deference to the wishes of the Liberal Party. So we see, that the tendency now is for ecclesiastical legislation to begin and end with Parliament, without any interference from or reference to Convocation. This seems a very startling subversion of justice. It is, moreover, a sad perversion of the terms of the Act for the Submission of the Clergy, tyrannical as it was, and it is also a very different policy to the principle asserted in the Statute for the Restraint of Appeals (24 Henry VIII., c. 12) which took away the right of the Pope to hear causes on appeal from England. In the preamble of this Act it is stated, that "the Spiritually" are to determine "all matters of spiritual learning and the law divine." It is, of course, true that, since its revival, Convocation has twice been allowed to confirm the suggestions of Parliament by enacting canons for the relaxation of minor points of ecclesiastical discipline. But this at best is making Convocation say yea to what Parliament suggests. Even the idea that Parliament must pass a Declaratory Statute to confirm any legislation which may have originated in Convocation seems really a false idea founded on

absolute misinterpretation of the Statute for the Submission of the Clergy.

What has Parliament ever had to do with legislating for the Church? Queen Elizabeth said in effect, "nothing at all," and all Sovereigns have alike by their conduct said the same, although they have often claimed unconstitutional powers for themselves as part of their prerogative. Yet in former years Parliament consisted entirely of at least nominal churchmen, and for that reason might have put forward some shadow of a claim to legislate for the Church its members all professed allegiance to. But what does our modern House of Commons consist of? We shall not ask if all its members be nominal churchmen; we shall not even ask if it consist entirely of Christians. We, on the contrary, seriously doubt whether many more than half its members are really Christians, and assert that at times the majority in Parliament has been actually hostile to the Established Church.

If it be answered in this connection that this merely shews that the Church has forfeited the confidence of the Nation, as the majority of the Nation's representatives are at times hostile to it, we would fall back upon our fundamental objection that Parliament never initiated legislation, or legislated alone, for the Church, until the Act for the Submission of the Clergy was misinterpreted to confer the power. So this answer misses the mark.

The question of the Church having forfeited the confidence of the Nation arises, if it arises at all,

only in connection with the question of Disestablishment.

How far the nation as a whole, represented by Parliament, accepts the faith and discipline of the Church is shown by the modern legislation in regard to Divorce and Marriage.

What claim then, has Parliament, as a matter of justice, or as a matter of constitutional history, to legislate for the Church, as it does and will continue to do, if churchmen submit? So we ask, what can churchmen do by way of practical protest against such injustice as this? They can (until the matter be settled in accordance with true Constitutional principles, and Convocation takes again its true position) do what they have done in more than one case already. They can fall back upon the principles of their Canon Law, and apply them to Statute Law. One of these principles is, that no law is of any validity, until it be "promulged and put in ure." Under this principle legislation by Parliament for the Church will be inoperative, if it be not recognised and accepted as valid by churchmen. Churchmen are under no obligation to obey laws which violate the terms of the alliance between the Church and the State, and which violate their consciences. When their duty to the Law of God and to the law of the land come into conflict, the higher duty must prevail. Several statutes have already become dead letters under the operation of this principle, because they have never been received by the Church in practice as valid, and so never put "in ure."

In ecclesiastical law Custom is of great importance. In the temporal laws of England also, Custom holds an important place, for even statutes in regard to secular matters have sometimes become dead letters, they have not been enforced in the face of unmistakable and widespread hostile public opinion.

In Ecclesiastical Law, however, Custom is even more important, and at the time of the first promulgation of a law it is supreme.

That is to say, Canons may be made, but to obtain the value of law, they must be both published to the faithful and put into practice (promulged and put "in ure"). The publication may be nullified by the passive non-compliance of churchmen, and so the new Canons never put "in ure," and Canonists would say they were "inoperative because not received." We claim that the same principle equally applies to Statute Law in the eyes of churchmen.

In secular law statutes may be practically obsolete through disuse, but they can be revived by user.

In ecclesiastical law, however, disuse at the outset, or non-reception, effects a real permanent abrogation, because the new law is never in fact put "in ure." Custom, however, in Ecclesiastical Law has more recognition than even this, for it is also one of its principles (or, at any rate, has been accepted by churchmen and Canonists as such in more modern times) that Custom, if sufficiently long persevered in, may effect a real abrogation or modification of church law, which

has been valid because received and put "in ure" at its inception.

We shall see many examples of this effect of Custom overruling express law when we come, later on (in Chapter VI.) to examine the numerous modifications of express law that have taken place in more modern times through liturgical custom.

The reason for this is that church law either is by nature, or has become by circumstances (more likely the latter) less elastic than the secular laws.

The Statute Law of England is continuously altered by the activity of Parliament. Church law, on the other hand, can only be made sufficiently flexible by a generous recognition of Custom. The reason for this most likely has been that in modern times, at least, the legislature of the Church has either been entirely suppressed (as it was from 1717 to 1852) or its powers usurped and hampered. The result has been that these necessary changes in the law, which should have been made from time to time, have been impossible, and the law has remained rigid and inelastic.

We have touched here upon a most difficult and controversial matter, namely, what exactly comes under the head of ecclesiastical law. The secular lawyer, viewing Ecclesiastical Law as a definite part of the laws of England, divides it into three classes, viz., Statute Law, Common Law, and Canon Law. He would include under the head Common Law, whatever in his opinion has been adopted from the ancient Customary Law of the Church. He would, of course, regard Statute Law

as supreme, and the Canon Law as subordinate to both that and Common Law.

In the eyes of the ecclesiastical lawyer, however, Ecclesiastical Law consists of two clauses only, the written Canon Law, old and new, and the unwritten Customary Law. The latter is now continually changing under the influence of Statute Law, i.e., it changes when a particular statute is received and put "in ure," it does not change if that statute be disregarded and "not received."

Both canonist and secular lawyer would agree, of course, that Canon Law is only valid so long as not contrary to Statute Law (which the ecclesiastic recognises only when "received" as Customary Law, and not before).

To sum up briefly, though legislation for the Church by Parliament is rightly abrogated in the eyes of churchmen by non-acceptance as Customary Law and non-user, yet, in the eyes of the secular lawyer and law-maker, no such abrogation takes place, i.e., Statute Law is supreme in all cases. Hence the present appearance of disorder and chaos in regard to ecclesiastical legislation.

We may usefully here give some of the more modern, and more obviously objectionable, examples of parliamentary legislation for the Church:—

The Church Discipline Act of 1840, which professed to deal with the procedure of Church Courts in general, and of the Diocesan Courts in particular.

This Act gave the Bishops power to send every

case, in which a clerk is charged with an "offence against the laws ecclesiastical," to the Provincial Court direct. The Bishops have generally acted upon this, and as a result, the Provincial Courts, instead of being courts of appeal, which is their proper sphere, have become courts of first instance.

The Diocesan Courts have, to a corresponding extent, dropped out of place in the Church's system of judicature. The Act, moreover, gives the Bishop power to hold a commission of enquiry, preliminary to the actual hearing of the case; it also compels the Bishop, when cases are heard in his own court, to sit in person, and to have the assistance of three assessors, one of whom must be a layman. This is, of course, an unconstitutional interference with the inherent powers of a bishop.

These three Acts were, of course, passed when Convocation was in abeyance.

Next we notice the Public Worship Regulation Act, 1874, which created a new court, that of Lord Penzance, which has never had even a trace of true spiritual and ecclesiastical authority. This statute was passed in spite of the Convocations, which opposed it in vain. It is thus a perfect example of the lengths to which the State is prepared to go in the way of ignoring the true Legislature of the Church.

When such things as this can be done in the name of law, it is little wonder that Church matters are in an unsatisfactory and disordered condition.

A new court was thus created, claiming the authority of the Court of Arches, and from which

appeal lay to the Judicial Committee of the Privy Council.

The qualifications for the office of Dean of the Arches, laid down in Canon 127, were ignored by the Act, which only required that the Judge should be a churchman and a barrister-at-law who had practised ten years, or had been "judge of one of the Superior Courts of Law or Equity."

He was, moreover, not to be appointed by the Archbishop, whom he professed to represent, but by both the Archbishops, and if they failed to agree, by the Crown through its civil ministers.

The person appointed, as the result of all these and other directions was to be "ex-officio" the Official Principal of both the Archbishop of Canterbury and the Archbishop of York.

Here was a new court of first instance in opposition to the old Diocesan Courts.

It is needless to say, that this new court was soon neglected, and the statute which created it is now a dead letter in the eyes of churchmen, under the principle of Canon Law before referred to. Most of its judgments were disregarded, and its further judgments never sought.

Now, since the retirement of Lord Penzance, the old Court of Arches has been revived under its properly qualified Deans, and such Deans exercise the jurisdiction of that old and constitutional court independently of any authority given by the obsolete statute of 1874.

The Local Government Act of 1894, which we add as a last example, is less open to objection than any of the preceding statutes, but its pro-

visions have none the less proved a real hardship to the Church.

From very early times the "parishioners" of a parish have been the Christians living in the vicinity of a certain church, and under the charge of the priest who serves that church. These "parishioners" have in each case become an organised community, who have acquired gradually most of the functions of local government in secular matters.

Thus an institution of ecclesiastical origin has become secularised in a manner, and to an extent which, in course of time, has become an injustice to churchmen. For this the Local Government Act of 1894 is chiefly to blame, because it has created a new and independent community for secular government, and retained the old ecclesiastical title of "parish." The householders in a parish have, for generations past, had the right to meet for the purpose of parochial business, in what is called a vestry meeting, so called because usually held in the vestry of the church.

This was quite natural and proper in days when all householders could only be churchmen, for Dissent was unknown.

Now, by Statute Law, all ratepayers, and only ratepayers, have the right to attend vestry meetings, and the number of votes allowed is a mere question of the extent to which the individual is assessed for the poor rate.

Thus the vestry meeting has become secularised, and all ratepayers within the area of an *ancient* ecclesiastical parish, which is now in every case

also a secular division, have the right to attend a vestry meeting of the old parish church, and interfere with church affairs. This, too, although the old parish may long ago have been divided up ecclesiastically into several new parishes.

The vestry meetings of new ecclesiastical parishes, having no secular functions, are free from this hardship. If the same answer be made on this point (as in regard to Parliament) that the Church is herself to blame for the fact that so many of the parishioners of the old parishes are non-churchmen, and that it is another illustration that she has forfeited the confidence of a large bulk of the Christians in the country, we again add that this point can only properly be raised on the question of Disestablishment, which we shall allude to later. It does not in any way affect the injustice of Parliament giving to all ratepayers, whether churchmen or not, the right to interfere in church matters connected with a particular parish church, under the pretence that the "parish" has become a secular division, and that therefore the ratepayers must have a voice in the secular business of the parish vestry meeting.

(b) The second class of usurped authority by the State over the Church is over its judicature.

This has proved to be, if possible, an even greater source of disorder than the similar abuses in regard to the Church legislature.

This abuse takes the form of a secular court of Final Appeal in ecclesiastical causes, which claims to hear purely spiritual causes without having any spiritual jurisdiction whatever.

Once more it is necessary to go back into the history of the matter and trace as briefly as possible, consistently with clearness, the growth of the Church Courts from early times. We must also show the extraordinary, and abnormal, origin of the present jurisdiction of this Secular Court, the Judicial Committee of the Privy Council.

Before the Conquest, the principal Court of the time for every purpose was the Shiremoot, in which the Bishop (the spiritual ruler of the shire) and the Ealdorman (its civil ruler) presided together. So in most ecclesiastical cases of offences against morals, the Bishop sat as judge in a public court, in which he laid down the law, and if a verdict of guilty were returned, pronounced sentence, which would be enforced by the secular power. In addition to these powers, the Bishop had the ordinary jurisdiction of the Church inherent in his office, and therefore he had some kind of "forum domesticium" in which purely spiritual cases were heard.

The Bishops were then the only ecclesiastical judges, and from their courts there was no regular system of appeal to provincial court or synod.

The only matters which came before the Provincial Convocations were such as came there from their nature in the first instance, as being beyond the jurisdiction of a bishop's court, or such as were sent there by letters of request.

William I. submitted his claim to the English throne to the Pope in the year 1066. Pope Alexander II. declared Harold a usurper, and gave William his blessing. In return for this, William

deposed Stigand from the Primacy and appointed Lanfranc, the Italian Statesman, Archbishop. Thus papal interference with church matters became more frequent than before, and increased as time went on. The Roman Canon Law was introduced into England, and finally thrust upon, and, during the later Middle Ages, accepted and administered by the English Church Courts.

One of the direct and early results of its introduction, however, was that the Church Courts became more efficient, and were separated from those of the State by William I., and so the Bishop and the Ealdorman no longer sat together in a common court.

This change was advantageous, and suited to the changed conditions, and was carried out with the consent of the leaders of the Church.

That there was no intention of subjecting the Church Courts to the secular power is clear, from the wording of the Royal Ordinance promulgating the new régime.

On the contrary, the object and effect of the change was to make the Church Courts more independent and more exclusively ecclesiastical.

The Church Courts were, as a result, to some extent reorganised, and the Archdeacons' Courts date from the reign of William I. They were, however, subordinate to the Diocesan Courts; the principle always being recognised that all spiritual jurisdiction within the Diocese is in the Bishop.

The Consistory Court of the Bishop became the ordinary court of the Diocese, and the court of appeal from the Archdeacons' Court.

About the end of the 12th century most of the work of the Bishop's Court was done by the Bishop's official, or the Official Principal, who was the Bishop's judicial delegate, might be a layman and usually was a professional lawyer.

After the Conquest, several provincial courts grew into prominence, the most important of which were the Court of Arches (the Court of the Official Principal of the Archbishop of Canterbury) and the Chancery Court (that of the Province of York). These two were the Supreme Ecclesiastical Courts of their respective provinces, and heard appeals from the Diocesan Courts. They also sat as courts of first instance in more important cases.

All other provincial courts, including the Court of Audience, and the courts of the various religious houses which had Peculiars, or courts of special jurisdiction of their own, have long since become obsolete.

Another result of the introduction of the Roman Canon Law into the judicial system of the Church of England was that the Canonists claimed that all legislative and judicial power came from the Pope, and that the Pope himself was the ultimate court of appeal in all church matters.

This theory was, of course, quite an innovation, and quite unfounded in fact. On this point William the Conqueror had decreed that the Royal Permission was an indispensable preliminary to all appeals to the Pope.

Henry II. re-enacted this in the Constitutions of Clarendon, and endeavoured to make such appeals

unnecessary by providing a regular system of appeals in the English courts.

In his 8th Constitution he provided. that cases were to go "from the Archdeacon to the Bishop, from the Bishop to the Archbishop, and if the Archbishop fails in doing justice, recourse is to be had last of all to our Lord the King."

Thus the Provincial Court of the Archbishop was, as a general rule, to be the final court of appeal, whilst special cases, which the King considered of sufficient importance, might go to the Pope by the King's express leave. The appeal to the King was never for a rehearing, but for instructions how to act. Henry gave up, after the death of Beckett, this power of veto on appeals to Rome, and relied upon his rights as a Sovereign at Common Law, to prevent his subjects seeking the decision of a foreign court.

Thus papal usurpation was kept in check by the exercise of the visitatorial power of the Crown.

The Church and State both struggled against papal aggression in general, and against papal claims to exercise ultimate appellate jurisdiction in ecclesiastical causes in particular, during the reigns of John, Henry III., and Edward I., with varying success.

The Pope, however, maintained the principle of his final appellate jurisdiction in some form or other, either by having a resident representative at the English court, or by investing the English Primate for the time being with his legatine authority until, in the reign of Edward III., the

first of the Statutes of Praemunire was passed (27 Edward III., st. 1).

This statute provided that all persons suing in a foreign court, on a matter which fell within the jurisdiction of an English court, should appear before the King's court to answer for their contempt; or in default thereof, suffer outlawry, imprisonment, and forfeiture of all property. This was re-enacted by subsequent parliaments, and thus Parliament did its best to check all Papal encroachments upon the liberty of the Church of England. We find, accordingly, that as a result of the various statutes of Praemunire, the Papal appellate jurisdiction at the time immediately preceding the Reformation was cut down to testamentary and matrimonial business.

We may here add, rather by way of digression, that another result of the separation of the Church Courts from those of the State was that they began to deal with large classes of cases not of a purely spiritual nature. We accordingly find that, as early as the reign of Henry I., writs of prohibition were issued from the King's courts, bidding the Church courts cease from proceeding further with cases, either because they had exceeded their proper jurisdiction, or had, in dealing with a matter properly within such jurisdiction, violated the secular laws of the State.

This matter culminated in the reign of Edward I., when the Ordinance of "Circumspecte agatis," in the year 1285, defined clearly those spiritual questions, which could be dealt with by the Church courts, without any possibility of inter-

ference by writ of prohibition from the secular courts.

This process of interference by writ of prohibition remains to this day. It has been mentioned before as one of the strictly constitutional methods by which the royal visitatorial jurisdiction over the Church courts can be exercised, in accordance with the terms of the alliance between Church and State.

We only allude historically to this in passing, and now return to the main subject at present under discussion, viz., appeals in ecclesiastical suits.

The next important matter to notice after the Statute of "Praemunire" of Edward II., in the historical chain of events, is the Statute of Appeals passed in 1533 (24 Henry VIII., c. 12). Cranmer held a court, under a commission from Henry VIII. to determine the question of the latter's divorce, and pronounced the marriage with Catherine invalid. This decision on a matter of such great importance, given by an English court, without any question of an appeal to the Pope, was a plain and unmistakable assertion of the principle of the English Reformation, and the Statute of Appeals quickly followed. In some ways this latter Act was a logical conclusion to the "Submission of the Clergy," for the recognition by the latter of the supremacy of the King, involved the rejection of that of the Pope, his appellate jurisdiction included.

The preamble of this Act clearly shows the nation as being complete in itself, and as having a

two-fold character, that of a civil state, and that of a spiritual state or church.

In neither character is it subject to the authority of any foreign power, lay or spiritual, but is completely independent under its true and only ruler, the King. Thus Supremacy of the Crown must be exercised over both estates alike, only through the proper constitutional channels, i.e., over the Church through the recognised spiritual authorities and courts, and over the State through the recognised civil authorities and courts.

We submit, that although the legislation of Henry VIII. in regard to the Church was arbitrary, and its real aim to enable him to govern the Church by his own despotic will, yet in theory, as evidenced by the wording of his statutes, he only claimed to rule the Church by her legitimate courts and synods. Thus neither the Statute of Appeals, nor the Act for the Submission of the Clergy, which followed in the year 1534, was in principle a serious breach of the then existing alliance between Church and State.

The Statute of Appeals took away all Papal jurisdiction over testamentary and matrimonial suits and cases connected with tithes in England, and provided that all appeals should be from the Archdeacons' Court to the Bishop, and from the Bishop to the Archbishop, without any further appeal, save that in cases touching the King or his successors, there should be an appeal to the Upper House of Convocation. We should note carefully here, that although this statute says all appeals on spiritual causes, yet it expressly provides only for

the testamentary and matrimonial suits and tithes, which are to end with the Archbishop, and it leaves purely spiritual matters, e.g., matters of doctrine and ritual, untouched.

We next come to the Act for the Submission of the Clergy, which has a direct bearing upon the subject of ecclesiastical appeals, as well as upon that of the legislative powers of Convocation. It is a moot point whether Convocation ever assented to this particular statute.

This Act deals with not merely matrimonial and testamentary cases and cases of tithes, as the Statute of Appeals did, but with "all manner of appeals of what nature or condition soever they be of, or what cause or matter soever they concern." It provides, that "for lack of justice at or in any of the courts of the Archbishops of this realm, or in any of the King's dominions, it shall be lawful to the parties grieved to appeal to the King's Majesty, in the King's Court of Chancery, and upon every such appeal, a commission shall be directed under the Great Seal, to such persons as shall be named by the King's highness, his heirs, and successors, like as in case of appeal from the Admiral's Court, to hear and definitely determine such appeals," and that from these commissioners there is to be no further appeal.

Thus the Court of Delegates came into existence. The statute was of course repealed in Mary's reign, but re-enacted by 1 Elizabeth, c. 1.

These provisions supplement the Statute of Appeals (which allowed an appeal in certain cases to the Upper House of Convocation) by

providing an additional appeal to the Crown in Chancery.

It is, however, clear, that the Act was only meant to apply to non-spiritual and quasi-spiritual, i.e., matrimonial and testamentary cases, for six reasons at least.

(1) Appeals on such cases had been taken away from the Pope by the Statute of Appeals, and nothing substituted; the appeal to Convocation, mentioned in this latter statute, being only in cases "touching the King or his successors."

(2) By the fact that no cases involving purely spiritual questions were in fact tried by the Court of Delegates until after the abolition of the Court of High Commission (of which hereafter) in the middle of the 17th century. Even then, there are only seven cases in the whole history of the court in which, even remotely, questions of doctrine appeared. Of these the appeal was withdrawn before judgment in five cases; and the findings of the court below were upheld in the other two. This is a matter of common knowledge.

(3) It is also possible to argue, with some show of truth, that as the Court of Delegates was only appointed to act in cases of "lack of justice" in the Archbishops' Courts, this was merely providing in statutory form a method of dealing with the latter courts, when they and other similar spiritual tribunals had given occasion for appeals "tan quam ab abusu," through error of procedure, misapprehension of law, etc. This would thus be a new method of exercising the visitatorial jurisdic-

tion of the Crown over the Supreme Church Courts.

(4) Moreover, the Statute of Appeals in the preceding year had distinctly laid down the principle that the King as Supreme Head of the Church, must only interfere in *spiritual* matters, through the proper spiritual authorities and courts.

Such a court as the Court of Delegates could not, by any stretch of imagination, be regarded as a proper spiritual court.

(5) This contention is still further supported by the following facts:—The 32 Commissioners who were to be appointed to review the Canon Law, according to the terms of the agreement between the King and the Clergy in "The Submission of the Clergy," and who were actually appointed in 1552 under Statute 3 and 4, Edward VI., c. 11, produced as the result of their deliberations what was known as the "Reformatio Legum Ecclesiasticarum."

This document possessed no authority whatever, because it was never formally accepted or ratified. Its importance, however, lies in the fact that it provided that the Upper House of Convocation or a committee thereof should form a final court of appeal. This is an indication, surely, that it was never intended that the jurisdiction of the Court of Delegates should cover the ground of purely spiritual cases, but that, on the contrary, another court of appeal specially for such cases should be formed after the revision of the Canon Law had been made by the Commissioners appointed for

the purpose. These Commissioners, however, never got any further than the publication of their "Reformatio Legum Ecclesiasticarum."

(6) There is no express mention in the Act for the Submission of the Clergy of questions of doctrine or ritual.

We contend that such an express mention of purely spiritual cases was necessary to give a new right of appeal in these matters where it did not exist before.

There was, as we have seen, no appeal on such matters to the Pope in latter years, i.e., before the Statute on Restraint of Appeals.

It is therefore difficult to contend that an appeal lay to the Court of Delegates under the new Act in these purely spiritual causes, without express words, and by mere implication.

The next historical point to notice in regard to ecclesiastical appeals is the formation of the Court of High Commission, as a consequence of the Act of Supremacy in 1559, which laid down the right of the Crown to act through Commissioners.

This court was an anomalous institution and exercised its power in an unconstitutional way. It usurped concurrent jurisdiction with the existing Church courts over every conceivable kind of ecclesiastical offence.

It existed for 80 years, and was abolished in 1641 by the Long Parliament. It had no direct spiritual jurisdiction, but only a visitatorial power as representing the Crown. Nevertheless its career was in many ways a misfortune to the Church.

It brought all ecclesiastical jurisdiction into bad odour. It interfered with the working of the regular Church courts, for although it had not really any appellate jurisdiction from the Diocesan and Provincial Courts, yet indirectly in practice it often exercised powers which were in the nature of of such a jurisdiction.

Another result was that the Court of Delegates lost, to a great extent, its proper place as the final court of appeal in quasi-spiritual cases.

So then, historically, except for the abortive suggestion contained in the "Reformatio Legum Ecclesiasticarum," we have not yet come upon a final court of appeal in purely spiritual cases. The existence of the Court of High Commission, moreover, had the effect of keeping the matter still in abeyance and perpetuating the defect.

Now we come to the final steps in the history of ecclesiastical appeals.

In 1832 (by statute 2 and 3, William IV., c. 92) the Court of Delegates was abolished, and its powers transferred to the King in Council. The Church had no voice at all in this measure, and gave no consent to it, and Convocation was in abeyance.

In 1833 (by statute 3 and 4, William IV., c. 41) it was enacted, that the power of hearing appeals transferred so recently to the Crown in Council, was to be exercised through a new court called "The Judicial Committee of the Privy Council," which was to consist entirely of secular judges.

This was certainly the climax of all harmful legislation for the Church by Parliament.

It is harmful and unjust, because Convocation was in abeyance and could not be consulted in the matter; and because these newly-appointed judges had no commission from the Church, would not necessarily have knowledge of the law they had to administer, and need not be members of the Church of England. The matter, however, has been made much worse by the fact that this new court has, as a matter of practice, usurped more than the true jurisdiction of the Court of Delegates. This latter court was never intended, and never claimed, to hear purely spiritual cases; whereas the Judicial Committee of the Privy Council has, from the date of its formation, sat as a court of appeal in such cases over and over again, without any scruples as to its rights to do so.

This, too, in spite of the well-known fact that Lord Brougham, after the Gorham case, admitted, that when the Act of 1833 was passed, it was not intended that the Judicial Committee should hear appeals in doctrinal cases.

To make "confusion worse confounded," the judgments of the Judicial Committee have been reviewed in practice, and if deemed incorrect, they have been reversed. This in spite of the fact that Parliament has professed to constitute the Judicial Committee of the Privy Council a *final* court of appeal. This irregular method of procedure was followed in the Lincoln case (Read v. Bishop of Lincoln, 1891, p. 9) wherein Dr. King, Bishop of Lincoln, was cited to appear before the Archbishop of Canterbury, to answer certain rubrical offences alleged against him. The question of the juris-

diction of the Archbishop over his suffragan bishops in such a case as this was a disputed one, but the Primate finally decided to hear the case, and it was tried before him. The important thing to notice here about it is, that of the six offences with which the bishop was charged, no less than five had already been pronounced illegal by the Privy Council Court, and it was urged, with some show of reason, that as the Judicial Committee was a final court of appeal, its decisions could not lawfully be reviewed by the Archbishop.

The Primate, however, overruled this objection, and by his conduct appeared to show that he considered the Privy Council was not in reality, but only *by usurpation,* a final court of appeal in ritual matters. He, however, professed to base his decision on different grounds, such as the fact that some of the points raised were entirely new, and that all were raised under different conditions to those of the former Privy Council cases, and also the fact that the researches of later students had brought much fresh information to bear upon obscure historical points. Whatever the real reasons of the ruling and decisions were, the Archbishop was, strange to say, supported on appeal by the Privy Council Court itself (1892, A. C. 644), a fact which we claim shows clearly that the latter *does not to this day know strictly what its true functions are, or how far it is in fact a final court of appeal.*

The principle upon which the Privy Council Court supported the decisions of the Archbishop, and in so doing reversed their own former

decisions, was declared to be that questions of Church Law are not to be decided by narrow interpretations of the formularies of the Church, as if these alone represented the mind of the Church. It decided that a reference to the whole of the law of the Church, written and unwritten, and to the historical circumstances under which that law came into existence was necessary.

If this be so in fact—and it is so from a churchman's point of view—nearly all the former Privy Council judgments were formed on a wrong principle, because this new principle of construction appeared and was stated, for the first time, in the Lincoln case.

Thus we see that the Archbishop's challenge that the Privy Council Court is not in fact a *final* court of appeal in purely spiritual matters such as ritual cases, has been vindicated.

Yet the Privy Council Court still exists, and may again try purely spiritual cases in the future, as it has done in the past, and although discredited by the last Ecclesiastical Royal Commission.

Of course, quite apart from all argument based on the history of ecclesiastical appeals in general, and on the origin of the Privy Council Court in particular, it seems obvious that such a secular court as the latter cannot, by any conceivable means, have any claim to *spiritual* authority of any kind.

Since 1832, except for an enactment contained in sec. 21 of the Judicature Act, 1873, which we need not notice, as it was repealed by the Appellate

Jurisdiction Act, 1876, there has been no change in the ecclesiastical judicature.

It is, however, worthy of notice, that the subject matter or scope of jurisdiction of the Ecclesiastical courts has been much abridged since 1832. In particular we nofice that: Suits for defamation were abolished by 18 and 19, Vic., c. 41. All the testamentary and matrimonial causes were taken away from the Church courts by 20 and 21, Vic., c. 77, and 20 and 21, Vic., c. 85. Proceedings against laymen in ecclesiastical courts for brawling were abolished by 23 and 24, Vic., c. 32. The Dean of the Arches decided in the case of Phillimore v. Machon (L.R.1.P.D. 481) that since the passing the Statute 4, Geo. IV., c. 76, jurisdiction in cases of perjury has been taken from the ecclesiastical courts. This on the principle that a statute which gives jurisdiction to a temporal court withdraws by implication the matter from the ecclesiastical courts. Jurisdiction in cases of dilapidations was destroyed by 34 and 35, Vic., c. 43.

Lastly, the abolition of the compulsory Church rates by 31 and 32, Vic., c. 109, has, of course, made the subject no longer ground for cases in the ecclesiastical, or in any other courts.

(c) The usurped authority of the State in regard to the appointment of bishops.

This consists in the fact that whereas the ancient historical method of selection was that the bishop-elect was chosen by the King, and the Chapter was bound to elect the King's nominee; now the bishop-elect is chosen, as a matter of actual prac-

tice, not by the King, but by the Prime Minister for the time being, after consultation with some of the leading bishops of the Church.

We have seen how the first usurpation of authority in this matter took place in the reign of Henry II. when, by the constitutions of Clarendon, the King was to nominate the person whom the Chapter must elect.

We have seen how the present system of "conge d'elire" grew out of this, and how later on, Henry VIII. wrongfully claimed the right to command the Metropolitan to confirm the election of his nominee.

We have thus a gradual growth of unconstitutional procedure, which is widely different to the old ideas, most of which has been acquiesced in by the Church from the force of circumstances or motives of policy.

The fact that the Prime Minister now acts for the King in these matters is a simple logical outcome of the fact that the powers of government in this country have now in substance passed from the King to Parliament. The evils and injustice of the present system are at least twofold:—

(1) The Prime Minister need not be a churchman. He may thus even be under the political influence of those who are hostile to the Church, and so conceivably be induced to abuse his power of selection of bishops-elect to her actual detriment.

(2) The consultation with the heads of the Church, which the Prime Minister is supposed to hold, may apparently be a mere supposition.

There is no constitutional guarantee that it shall be valid and adequate.

One of the practical disadvantages of the present system is certainly that in some cases the wrong men are made fathers of the Church. Their personal influence and authority on the bench of bishops, in the direction of obedience and loyalty at the hands of the general body of the clergy under them, is consequently greatly minimised.

To sum up under this head:—

The usurped authority of the Crown to order the Archbishop to confirm the State's nominee to a vacant bishopric is historically correct, and now accepted as a term of the quasi-contract of Establishment by the Church.

The system of "conge d'elire" is also of ancient growth, equally an usurpation, but now equally accepted by the Church.

The so-called election by the Chapter (if any) is an almost meaningless formality, and no election at all, in the proper sense of the word.

The nomination of the bishop-elect by the Prime Minister is, on the other hand, a *modern* innovation, traceable to the growth of the power of Parliament, and quite unhistorical. It cannot be accepted by the Church as one of the terms of her Establishment.

CHAPTER III

Alleged breaches or neglects of Law relating to the conduct of Divine Service in the Church of England, and to the ornaments and fittings of churches.

We shall now take in order the various breaches and neglects of Church Law as stated to be so by the Royal Commission on Ecclesiastical Discipline in their Report dated 21st June, 1906.

In taking their findings and their statements of the law as correct, we may feel sure of one thing at least, and that is that the list of offences will be fairly exhaustive so far, at any rate, as advanced churchmen or Ritualists are concerned.

We shall deal with them in quite a different order, to that in which they appear in this report, and shall divide them into two classes:—

The first class embracing all those offences upon which some judicial decision or opinion has been given.

The second class including all those which do not come under that heading.

The Commissioners assert that they had before

them evidence in regard to alleged irregularities and illegalities in the services at 559 churches.

The offences, which we place under headings (a) to (t) inclusive, constitute our first class, those which infringe some judicial or quasi-judicial decision. Those which we include under headings (1) to (36) inclusive, embrace all the others mentioned in the Royal Commissioners' Report.

Before we proceed to deal with these various alleged offences in order, we take this as a convenient place to make an important digression on the question of the true meaning and legal authority of the Prayer Book rubrics. Almost every offence which the Commissioners enumerate may be said to infringe, directly or indirectly, some of the Prayer Book rubrics. It is therefore, perhaps, not out of place to endeavour here to determine exactly their true importance and significance.

Firstly, we may safely say that rubrics are distinctly unlike ordinary statute law, which has always one definite ascertainable force. They would seem to be, on the contrary, merely directions or marginal notes, intended to help the memory of the minister. They vary in completeness, authoritativeness, and clearness, and many of them are in fact designedly vague and capable of more than one interpretation.

This is probably because the Prayer Book has, we contend, during all the history of its creation and modification, retained at least one characteristic, that is the endeavour to be "comprehensive."

These characteristic features of the rubrical directions of the Prayer Book are precisely such as legal (as distinguished from ecclesiastical) tribunals cannot easily recognise or adequately interpret.

The whole history of the Judicial Committee's legal decisions is proof of this.

There is, however, another point to notice in regard to this comprehensiveness, which the compilers and revisers of the English Prayer Book have all consistently aimed at, which is this, not only have they purposely, in many cases, left the rubrics vague, but they also have left them incomplete for the same reason.

The debatable and difficult question of ceremonies is largely avoided by the rubrics, and it seems most likely that the latter were never intended to form a complete code of instructions. Much is left untouched and vague, to be decided by the practical working of liturgical custom.

There is a double reason for holding this opinion:

The first reason is, that the Prayer Book with its rubrics as they stand is unintelligible, except on the theory, that it presupposed the existence of a well-known system of liturgical usages, and that it only gives such directions as were necessary to carry out and explain the *changes* which had been made in the old service books and missals, from which its materials were mainly derived.

This existing liturgical system thus made elaborate rubrical directions unnecessary.

(This roughly, we add in parenthesis, was the principle of interpretation applied to the rubrics by the Archbishop in the Lincoln case).

Whether or not it was intended to retain every gesture and ceremonial detail which was not expressly abolished or modified, it is difficult to say with any certainty. On this point, however, we read in Wakeman's "Introduction to the History of the Church of England" (6th edition, at page 280) as follows:—"Probably the revisers desired to leave much indeterminate to be shaped by events. All that can safely be said is, that of the two opposing theories which have been held on this subject, i.e., that no ancient ceremony is permissible which is not expressly authorised, and that every ancient ceremony is permissible which is not expressly condemned, the latter is the only one to which the rubrics of the Prayer Book of 1549 lend any assistance."

This for the reason that the Book taken as it stands is obviously incomplete. We do not wish these mere statements to be taken as arbitrary. Let any person study our Prayer Book services, having first disabused his mind of all preconceived ideas about them, and let him on that basis try and determine, *merely from the rubrics,* exactly how they are to be conducted. If this be done carefully, the statements that the rubrics presuppose some well-known already existing system of liturgical custom, which they are merely meant to supplement, will be accepted without much further difficulty. Moreover, it can be easily shown that certain things have to be done for which

there are no directions given in the Prayer Book. The rubrics will thus appear, in what we contend is their true light, as *marginal directions which are supplemented, and can even be overruled, by liturgical custom of long standing.*

The second reason is, that as Church Law has in this country been always, from circumstances already mentioned, rigid and inelastic, there has always existed, to counteract this inelasticity, a system of liturgical custom more or less in a state of flux.

Many examples of this could be given. We give the custom of turning to the East in all the Creeds as the most universal, and one least likely to be challenged. Another equally good example is the almost equally common liturgical custom of the priest saying the Lord's Prayer at the beginning of the Holy Communion service alone. This is in flat contradiction of the rubric before the first Lord's Prayer at Morning Prayer, which says expressly that the people are to repeat the prayer with the priest "both here and wheresoever else it is used in Divine Service."

Messrs. Proctor & Frere, in their "New History of the Book of Common Prayer," give the black gown as a vestment of the minister, as another good example of a ceremonial observance "which has come and gone in independence, or even in defiance, of the rubric."

This vagueness and incompleteness of the rubrics, we therefore contend, purposely existed to give scope for the inevitable and healthy growth and development of liturgical custom.

Of course, we know that the exact legal force of rubrics is a disputed point, and that some people treat them as positive law which cannot be overruled by custom.

This contention we claim, however, to have sufficiently dealt with in the arguments we have now given. A rubric then, we conclude, is a mere direction, not a ceremonial law, and as the Rev. T. A. Lacey pertinently points out:—*

"The wholesome reaction in the middle of the 19th century from prevailing laxity brought with it an almost superstitious regard for rubrics, which was disavowed by the Bishops of the time." The same writer sums up the matter by saying:— "The rubrics are first rate evidence of what is obligatory, though some are inconsistent with positive law (Canon 59) as that about catechising during Evensong (first rubric after Church Catechism), some refer to an ideal that was never attained, and some to a state of things that is obsolete."

"They must be read with caution, and with reference to other evidence by means of which ministers of public worship should inform themselves of their duties."

With these preliminary remarks in regard to the rubrics in general, we take up the main thread of our subject, and say that the Commissioners found that the following breaches and neglects of the law are or have been prevalent:—

*"Handbook of Church Law," 1903 Ed., p. 195.

Class A

Those upon which some judicial decision or opinion has been given.

(a) Wafers, or pieces of bread pressed and shaped so as to have the appearance of wafers, were used at celebrations of the Holy Communion in 279 out of 559 churches in respect of which complaints were lodged. The rubric in the present Prayer Book asserts that "it shall suffice that the bread be such as is usual to be eaten, but the best and purest wheat bread that conveniently may be gotten."

It has been judicially decided by the Judicial Committee of the Privy Council in the cases of Ridsdale v. Clifton (L.R. 2, P.D. 276) and Elphinstone v. Purchas (L.R. 3, A. and E. 66, and 3 P.C. 365) that whilst wafers are illegal, bread "such as is usual to be eaten" does not become illegal by being so pressed and shaped as to resemble a wafer.

(b) In 386 of the 559 churches the celebrant at the Holy Communion genuflected during the Consecration Prayer.

There is no direction for such an act in the Prayer Book, and it has been declared by the Privy Council Court, in the case of Martin v. Mackonochie (L.R. 2, P.C. 365, and L.R. 3, P.C. 52), illegal for the celebrant to genuflect or kneel during any part of the Consecration Prayer.

(c) In 31 of the churches there were images

with lights or flowers, or both, placed in front of them, apparently to do them honour.

These images represented the Virgin and Child; the Virgin alone; the figure of our Lord known as the Sacred Heart; or St. John. They were so placed, either behind or at the side of an altar, or at the entrance to the chancel, as to make it difficult to regard them as mere architectural decorations.

The law in regard to images, not used in public services, has been laid down in the cases of Westerton v. Liddell (Moore's special report), Philpotts v. Boyd (L.R. 6, P.C. 435), Ridsdale v. Clifton, Hughes v. Edwards (L.R. 2, P.D. 361), and *re* St. Anselm Pinner (L.R., 1901, P. 202), substantially as follows:—Such images are lawful as subjects of decoration in a church, but are unlawful if they are made, or are in danger of being made, objects of superstitious reverence contrary to Article XXII.

(d) In 67 of the churches roods had been introduced on the chancel screen, consisting either of a crucifix alone, or of a crucifix with the figures of the Virgin and St. John on either side.

In accordance with the law in regard to images expressed above, crosses, if not placed on the altar, and crucifixes, if part only of sculptured design or architectural decoration, have been declared lawful. The question whether a crucifix or rood standing alone, or combined with the figures of the Blessed Virgin and St. John, can be regarded as mere decoration, is unsettled.

(e) Illegal vestments were worn by the clergy whilst ministering at the various services, and most noticeably at the service of Holy Communion.

The Commissioners assert that the law in regard to the vesture of the clergy during their ministrations has been declared as follows:—

(1) In parish churches all priests must wear a surplice only.

(2) In Cathedrals and collegiate churches during the Holy Communion the principal minister should in addition wear a cope "with gospeller and epistoller agreeably." To these we add the "hood" and tippet, which are prescribed by Canon 58.

The latest authority for this is the decision of the Judicial Committee in the case of Ridsdale v. Clifton, confirming the decision of Lord Penzance in the same case. Special eucharistic vestments had already been declared illegal, in the earlier Privy Council case of Elphinstone v. Purchas. The commonest breach of the law of vestments, as thus declared, is the use of a stole. The cope was used regularly in one Cathedral only, occasionally in 10 others, and never at all in 25 Cathedrals. Special eucharistic vestments, such as the Alb, the Amice, the Chasuble, the Girdle, the Maniple, and the Stole, were worn in 491 of the churches in regard to which evidence was given before the Commissioners.

(f) The chalice was ceremonially mixed *during* the Holy Communion Service at 439 of the churches.

The law on this point, as decided in what is known as the Lincoln case, i.e., the case of Read v. Bishop of Lincoln (L.R., 1891, P. 9, and 1892, A.C. 644), by the Judicial Committee, confirming both the judgment given in the same case in the Archbishop's Court, and the judgment delivered in the earlier case of Martin v. Mackonochie, is as follows:—

The administration of wine mixed with a little water, that is, of the mixed chalice, is not unlawful, but the mixing of the wine and water during the service is an additional ceremony not mentioned in the Prayer Book, and therefore unlawful. The actual words of the Archbishop on this matter, in his judgment in the Lincoln case, were as follows: "The Court decides that the mixing of the wine in and as part of the service is against the law of the Church, but finds no ground for pronouncing the use of a cup mixed beforehand to be an ecclesiastical offence." The ceremonial mixing which thus constituted an offence, according to the evidence before the Commissioners, took place in three ways:—

(1) The pouring of water and wine from separate cruets into the chalice, accompanied by solemn act, such as making the sign of the cross over the chalice;

(2) The same, unaccompanied by any solemn acts;

(3) The pouring of wine into a chalice already containing water, placed there before the beginning of the service.

The Commissioners rightly point out, that of

these three the first alone constitutes a ceremonial mixing in any substantial sense of the term, whilst the third can only be considered illegal in the purely technical meaning of the word "ceremony."

(g) Lights were frequently used on the Holy Table during Holy Communion when obviously not required or intended for purposes of illumination. There were two such lights used in 308 of the churches, and more than two at 172 of the churches.

It was decided by the Judicial Committee, in the case of Martin v. Mackonochie, that lighted candles placed on or behind the altar during the Holy Communion Service, when not required for illumination, are illegal.

It was further held by Archbishop Benson, in the Lincoln case, that "The lawfulness of lighting the candles in the course of the service is not before us. But the Court does not find sufficient warrant for declaring that the law is broken by the mere fact of two lighted candles, when not wanted for the purpose of giving light, standing on the Holy Table continuously through the service; nothing having been performed or done which comes under the definition of a ceremony, by the presence of two still lights, alight before it begins and until after it ends." This question was not re-opened in the Lincoln case on appeal when it went before the Privy Council.

(h) The officiating priest in 298 of the churches, during the Holy Communion, made the sign of the Cross upon the elements, vessels, and other objects, such as the Gospel Book, also

over the people. This was done sometimes with the hand alone (especially at the time of the Absolution or Benediction) and sometimes when holding the Chalice or Paten.

The Archbishop decided in the Lincoln case as follows:—"The Court therefore finds that there is no justification, either in direction or usage for making the sign of the Cross, in giving the final benediction, that the action is a distinct ceremony not retained, since it had not previously existed; and that therefore it is a ceremony additional to the ceremonies of the Church, according to the use of the Church of England." This was upheld by the Judicial Committee on appeal.

At the same time we must notice that the Court of Arches has decided in the case of Martin v. Mackonochie, that if a minister cross himself during the service, as an act of private devotion, he does not commit an ecclesiastical offence.

(i) In some indefinite number of the churches the celebrant at Holy Communion, during the Consecration Prayer, leaned over the altar or stooped over it, in such a way that the Manual Acts could not be seen, even by those members of the congregation who had "drawn near to the Communion Table."

The Archbishop, in the Lincoln case, on this point delivered judgment as follows:—"The Court decides that the Order of Holy Communion requires that the Manual Acts be visible. . . The Court rules that the Manual Acts must be performed in suchwise as to be visible to Communicants properly placed."

This confirmed a similar decision of the Judicial Committee in the case of Ridsdale v. Clifton.

(j) In some of the churches, where an extreme ritual was practised, a long pause was made, both before and after the Consecration Prayer. During this pause (inter alia) hymns or anthems, such as the Benedictus, or the Agnus Dei, were introduced.

The Archbishop, in the Lincoln case, laid down the principle that such hymns or anthems, so introduced as to "let or hinder" the Communion Office, are illegal.

(k) In 13 of the churches the Sacrament was reserved, either publicly in the church itself, or in a chapel to which the public had access, or which was so arranged that the place of reservation was visible from outside the chapel.

Reservation of the Sacrament, for any purpose whatever, has been declared unlawful by the Archbishops of York and Canterbury in 1899, at what is usually known as the "Lambeth Hearing."

Incidentally, Reservation has also been declared unlawful, both by the Court of Arches and by the Judicial Committee, in the case of Martin v. Mackonochie, and again by the Judicial Committee in the case of Shepherd v. Bennett (L.R. 4, P.C. 350), though in all three instances the matter was a mere "obiter dictum."

(l) Incense was used ceremonially in 99 of the churches.

By ceremonial use (the Commissioners say) is

indicated a use of incense in and as part of public worship, whether there be any censing of persons and things in a technical sense or not.

The Court of Arches held, in the cases of Summer v. Wix (L.R. 3, A. & E. 58) and Martin v. Mackonochie (L.R. 2, A. & E. 116) that the ceremonial use of incense is illegal. In the former case the Dean of the Arches (Sir R. Phillimore) spoke as follows:—"With respect to the use of incense, the principal defence is, that it is employed during an interval between two services, and neither belonged to, nor was subsidiary to either. . . I think the fair result of the evidence is that incense was used in the interval between two services which would otherwise have immediately succeeded each other; almost the same congregation was present at *both* services—and in the interval between them. Looking at all the circumstances, it would be most unreasonable and unjudicial not to conclude that the burning of incense was intended to be subsidiary and preparatory to the celebration of the Holy Communion."

The Archbishops at the "Lambeth Hearing" also delivered their opinion that the ceremonial use of incense is illegal, and that if incense be used at all, it must be outside the worship altogether, and only to sweeten the church.

On the question of the use of incense, we must also notice (as the Commissioners point out) that it has been decided by the Court of Arches, in the case of Elphinstone v. Purchas, that processions in a church, immediately before or after the

regular services, taking place in the presence of the congregation, constitute ceremonies, so connected with the regular services as to be bound by the same legal restriction as the services themselves.

Thus the use of incense in such processions is a ceremonial use, and therefore illegal.

(m) In 79 of the churches lighted candles carried by acolytes or other subordinate ministers, were used at various parts of the Holy Communion service, especially in the procession at the beginning of the service, at the reading of the Gospel, and at the Consecration.

The Court of Arches has declared in the case of Summer v. Wix that the ceremonial use of portable lights is illegal.

We append the following excerpt from Sir R. Phillimore's judgment in that case:—"The lights which were burnt in this case were not upon the Holy Table . . . and therefore are unaffected by the injunctions, and the lighting and the burning of them in the manner and the circumstances proved appears to me to fall under the category of ceremonies. Nor are they, in the language of the Privy Council in Martin v. Mackonochie, "inert and unused,' but things actively employed as a part of a ceremony and are therefore illegal according to my own decision in the same case."

Similarly the Archbishops of the "Lambeth Hearing" expressed the opinion that the carrying of lights in procession is illegal and unauthorised.

(n) In 212 of the churches a bell (either the

church bell, or what is known as a sanctus or sacring bell) was rung at one or more of the following times:—(1) at the time of the consecration of the bread and of the wine; (2) at the singing or saying of the words, "Holy, Holy, Holy, Lord God of Hosts," &c.; (3) at the moment when opportunity should be given for intending communicants to come forward to receive the sacrament.

The use of the sacring bell at any time during the service of Holy Communion was held to be illegal by the Court of Arches in the case of Elphinstone v. Purchas.

(o) In 19 of the churches there were stoups for holy water placed inside the church door for use by the congregation as they entered to worship.

In 5 of the churches the ceremony of sprinkling holy water was introduced.

The Commissioners state that objections to the presence of holy water stoups in churches, and to the sprinkling of water in connection with the services of the church, have been sustained in the cases of Elphinstone v. Purchas, and Davey v. Hinde (L.R. 1903, P. 221).

(p) In 5 of the churches a candle of great size, called the Paschal Candle, was introduced and lit at Easter.

The use of the Paschal Candle was declared illegal by the Court of Arches in the case of Elphinstone v. Purchas.

(q) In some few of the churches notices were given of services on Black Letter Saints' Days.

The Dean of the Arches in the case of Elphinstone v. Purchas, spoke as follows with regard to this offence: "It appears from the evidence that at different times notices were given that the Feasts of St. Leonard, St. Martin, and St. Britus would be observed. The rubric after the Nicene Creed directs that the curate shall declare unto the people what holy days or fasting days are in the week following to be observed. Mr. Purchas is not charged with having violated the law by omitting to give notice of these holy days or fasting days, but by giving notice of holy days which the Church has not directed to be observed. I think the holy days which are directed to be observed are those which are to be found after the Preface of the Prayer Book, under the head 'A Table of all the Feasts that are to be observed in the Church of England throughout the year.' The Feasts of St. Leonard, St. Martin, and St. Britus are not among these. I therefore think that the notices of them were improper, and I must admonish Mr. Purchas to abstain from giving such notices in the future."

(r) In 413 of the churches the celebrant elevated the consecrated bread, and also the chalice, at the time of consecration.

Again it has been decided by the Court of Arches in Elphinstone v. Purchas that such elevation of the consecrated elements is illegal.

(s) In 142 of the churches the officiating

clergy, immediately before the beginning of the Holy Communion, and while standing before the altar, engaged in devotions of the nature of an addition to the service, rather than of private prayer. These devotions were generally inaudible, and accompanied by gestures, and sometimes included responses between the priests and the servers. It was admitted that these devotions were a rendering or adaptation in English of the Confiteor or Preparatory Service of the Mass.

In 143 of the churches, after the Benediction in the Holy Communion service, the celebrant read, generally inaudibly, and sometimes with genuflection at the mention of the Incarnation, the passage from St. John's Gospel (John 1, v. 1—14) which, in the Roman Missal, is directed to be read by him, and which is known as the "Last Gospel."

In about 90 of the churches both the Confiteor and the Last Gospel were used.

Both were defended as being merely private devotions of the minister, with which neither the law nor the congregation has any concern. Both, however (the Commissioners assert) were used in such close connection with the Prayer Book service, that they are open to condemnation as unauthorised additions to it, on the principle of the decision before mentioned, as delivered by the Court of Arches in Elphinstone v. Purchas, i.e., that processions in a church, immediately before or after the regular services, taking place in the presence of the congregation, constitute ceremonies

so connected with the regular services as to be additions to them.

(t) Pictorial or sculptured representations of Our Lord's Passion hung round the walls or pillars of the church were declared to be present in 138 of the churches.

The full number of such representations was 14, which included traditional incidents of the Passion not recorded in Holy Scripture.

A series of representations of 14 stations of the Cross was directed by the Court of Arches, in Clifton v. Ridsdale (L.R. 1, P.D. 316), to be removed from a church in which they had been placed without a faculty. An opinion has also been incidentally expressed in the case of Davey v. Hinde, that at least the two representations of traditional incidents mentioned above were decorations forbidden by law.

In some of these churches, at least, a series of devotions of a public or private nature, known as the "Stations of the Cross," were conducted before each of these representations in succession.

Class B

Breaches of the Prayer Book and its Rubrics upon which no judicial decision or opinion has been given.

(1) The ceremony of the Lavabo, that is, the washing of the celebrant's fingers after placing the elements on the Holy Table, and before the

Prayer for the Church Militant, was practised in 249 of the churches.

(2) The ceremony of washing the altar with water and wine, as practised in the Roman Church on Maundy Thursday, was performed in one of the churches.

(3) In 52 of the churches the celebrant, after his own communion, and at the point in the service at which the intending communicants should approach, turned round from the altar and, standing with his face towards the people, exhibited the consecrated wafer or bread, and said to the congregation, "Behold the Lamb of God, that taketh away the sins of the world."

(4) A service known as the "Blessing of the Palms" on Palm Sunday had been introduced in some of the churches. It consisted of the blessing of palms by the priest, with the use of incense, and (in one case) with the sprinkling of holy water; of the distribution of the palms so blessed among the clergy and congregation; and of a procession in the church, in which the clergy and congregation, carrying these palms, took part.

(5) "Tenebrae" had also been introduced in some of the churches. Tenebrae is the name given to a special form of Matins and Lauds used on the Wednesday, Thursday, and Friday in Holy Week.

A number of lighted candles were extinguished one by one at the end of each Psalm, recalling the darkness of Calvary. A single candle remained alight which, after the Benedictus, was hidden

behind the altar, and again brought out at the close of the service to signify that Christ the Light of the World was hidden in the grave and afterwards rose again.

(6) In many cases special occasions, such as Harvest Festivals, Missionary gatherings, and Dedication Festivals (not covered by the Shortened Services Act (35 and 36, Vic., c. 35, sec. 3) were observed by the holding of special services. Additional irregularity was introduced by the use in some few cases of Collects, Epistles, and Gospels other than those appointed by the Prayer Book.

This is contrary to section 4 of the Shortened Services Act.

(7) In three or four of the churches a service practically identical with the Good Friday Mass of the Prae-Sanctified in the Roman Church, at which the consecration of the elements is entirely omitted, was held.

The reserved sacrament was brought with much ceremony from a side altar, and consumed by the priest alone, and there were no communicants.

(8) In one case a service was held which closely approximated to the Roman form of the "Benediction with the Sacrament."

(9) In several cases Days and Festivals were observed which were either excluded from the Kalendar in the Prayer Book, or which have been introduced since the Reformation into the Kalendar of the Roman Church.

The following cases were brought to the notice of the Commissioners:—8 services on All Souls'

Day; 5 services and 19 notices of services on Corpus Christi Day; 1 service on the Festival of the Espousals of the Blessed Virgin Mary; 2 services and 2 notices of services on the Festival of the Assumption of the Blessed Virgin; and 1 service on the Feast of the Sacred Heart.

(10) In 4 of the churches prayers or hymns addressed to the Virgin were used; in one other case the intercessions of the Virgin Mary were asked in a hymn at a service called "the Vespers of the Blessed Virgin"; and in another case, a Litany was used in the service of "Bona Mors," appealing to God for help at the intercession of the Blessed Virgin and various saints.

(11) In 14 of the churches the invitation to communion beginning, "Ye that do truly and earnestly repent you of your sins," was omitted.

The Commissioners add that they think this omission was due to the fact that no communicants were expected. How this fact affects the legality or otherwise of the omission it is difficult to see.

(12) In three cases the Creed, the Gloria in Excelsis, and the Blessing were omitted from the Holy Communion service; in two other cases the Gloria in Excelsis alone; and in one other case the Creed alone was omitted.

(13) In many instances habitual auricular confession to a priest was pressed by the clergy on their congregations as a *duty*, especially before confirmation and before receiving the Holy Communion.

This is quite contrary to the practically unani-

mous declaration of 100 Bishops of the Church, set forth in the Encyclical Letter issued by the Lambeth Conference of 1878.

(14) In several churches services were held in connection with what is known as the Guild of All Souls, a society founded to arrange for special services on the eve of All Souls' Day, and for special celebrations of the Holy Communion on All Souls' Day itself, and throughout the month of November in each year. These services varied in detail, but their general character was uniform.

Sometimes lists of the names of deceased persons, for whom the prayers of the congregation were asked, were read or distributed at such services. At the special celebrations of Holy Communion there were generally no communicants. The ritual employed, and the nature of the service, closely resembled those of the Roman Church, and it was arranged in complete disregard of any obligation to adhere to the Order of Holy Communion in the Book of Common Prayer.

(15) Celebrations of the Holy Communion were held in 114 of the churches, at which there were no communicants except the celebrant, and in some of these cases no one was either invited or expected to communicate with the priest.

Such solitary masses, as they are sometimes called, are plain violations of the Prayer Book rubrics, which declare that "there shall be no celebration of the Lord's Supper except there be a convenient number to communicate with the priest according to his discretion," and that "if

there be not above 20 persons in the parish, of discretion to receive the Holy Communion, yet there shall be no communion except four (or three at the least) communicate with the priest."

(16) The rubric, which directs that the Creed of St. Athanasias shall be sung or said on certain feast days at Matins instead of the Apostles' Creed, is frequently disregarded, in whole or in part.

(17) It is a very general practice to omit (a) an exhortation giving warning for the celebration of Holy Communion, (b) the Exhortation at the time of the celebration of Holy Communion.

(18) It is a very common practice for the minister, during the time of divine service, to publish notices, other than those prescribed in the Prayer Book, or enjoined by the King or the Ordinary.

(19) In one case the words of administration at the Holy Communion were said to a whole row of communicants, kneeling to receive the Sacrament, instead of to each individual separately.

(20) In four of the churches the first part only of the words of administration were said to each communicant.

(21) It is a general practice for bishops to introduce addresses in the Confirmation service.

(22) It is a firmly-established practice for a deacon to read those portions (other than the Absolution) of Morning and Evening Prayer, which are directed to be read by a priest.

(23) It is a common practice to make a collection during Morning and Evening Prayer.

(24) It is a universal custom to give a benediction or blessing after the sermon at Evening Prayer.

(25) It is a decreasing practice to give a benediction or blessing at the end of the Ante-Communion service, before the withdrawal of those who do not remain during the celebration which follows.

The Commissioners say they had no evidence as to the extent of the prevalence of this irregularity.

(26) It is a habitual practice to omit the daily services, and not only on occasions when the curate is from home or "otherwise reasonably hindered," as the Prayer Book states.

(27) Service on Ascension Day is omitted in some cases.

(28) Service on the various Holy Days appointed to be observed (other than Christmas Day, Good Friday and Ascension Day) is also omitted in many cases.

(29) In some cases the rubric which requires the curate "to declare unto the people," after the Nicene Creed, "what Holy Days or Fasting Days are in the week following to be observed," is disregarded.

(30) In some cases the prayer for the Church Militant is omitted, when the Ante-Communion service is said, but there is no celebration.

The Commissioners admit that all the offences under headings 26, 27, 28, 29, and 30 are steadily decreasing.

(31) The rubric which declares that, except in case of necessity, "it is most convenient that Baptism should not be administered but upon Sundays and other Holy Days, when the most number of people come together," is frequently disregarded.

(32) The rubric which directs that "the curate of every parish shall diligently upon Sundays and Holy Days after the second lesson at Evening Prayer, openly in the church instruct and examine so many children of his parish sent unto him, as he shall think convenient in some part of the catechism," is also frequently disregarded.

(33) There is an almost universal disregard of the rubric which requires that "so many as intend to be partakers of the Holy Communion shall signify their names to the curate at least some time the day before," and a frequent disregard of the rubric which requires that 'everyone shall have a Godfather or a Godmother as a witness of their confirmation."

(34) The whole or part of the Ante-Communion service is frequently omitted.

This practice, however, of omitting the whole of the Ante-Communion service (the Commissioners admit) is decreasing.

They, however, assert that it is a widespread custom to omit parts of the Ante-Communion service. In 52 of the churches the Decalogue and the Prayer for the King were omitted. In five others the Lord's Prayer and the Collect for Purity were also omitted.

In two of these latter five no offertory sentence was read. In one other case the Collect for Purity, the Decalogue and the Prayer for the King were omitted. In 23 of the churches the Decalogue alone, and in seven others the Prayer for the King only were omitted.

(35) It is a common practice to repeat "Thanks be to thee, O God," or similar words, after the Gospel in the Holy Communion service.

(36) The practice of placing the Bread and Wine intended to be consecrated upon the altar before the beginning of the Holy Communion service, in disregard of the rubric which directs that this is to be done immediately before the Prayer for the Church Militant.

CHAPTER IV

Summary and Criticism of the Royal Commissioners' Comments and Recommendations.

LET us now consider and discuss, as briefly as possible, what the Royal Commissioners assert is the result of the evidence brought before them, together with their comments and recommendations in regard to the same.

The Commissioners find (in substance):—

That "the law relating to the conduct of Divine Service and the ornaments of churches is nowhere exactly observed, and certain minor breaches of it are very generally prevalent."

That "the law is also broken by many irregular practices. Some of these are omissions, others err in the direction of excess."

We presume that nobody would attempt to dispute these statements.

That "other omissions, such as the neglect of Holy Day services, are due for the most part to carelessness, or to a deficient respect for the Church's rule."

"Few have any doctrinal significance, and any

such significance would seldom be recognised by those responsible for them." That in not many cases is there "a deliberate intention to disregard what the Prayer Book requires."

This is a significant admission to make.

That "with regard to irregularities in the direction of excess, . . . the significance of many of them lies rather in an apparent approximation to the forms of worship of the Church of Rome than in any necessary connection with Roman doctrine," but that some of these irregular practices "may emphatically be said to belong to the class of ceremonies which were designedly abandoned in the sixteenth century."

This last is a statement which cannot be allowed to pass unchallenged. The Commissioners give no evidence whatever of this alleged designed abandonment, and we shall hope to show later on that this abandonment is at least a debatable point. Disuse there has certainly been, but whether there has been disuse for such a period as would necessarily mean total abandonment, is open to question.

That "practices unquestionably significant of doctrine condemned by the Church of England," though far less frequent than the former, exist in considerable numbers, and "lie on the Romeward side of a line of deep cleavage between the Church of England and that of Rome."

This is again a somewhat sweeping statement. We shall hope to show that these practices, which are "unquestionably significant of doctrine condemned by the Church of England," were of very rare occurrence indeed in those churches which

were brought to the notice of the Royal Commissioners. We may also safely take it that those churches which were so brought to their notice would include a fairly exhaustive list of the worst offenders against the law of Divine Service, because the evidence placed before the Commissioners was carefully compiled by those who are the most hostile critics of the high church and ritualistic clergy. In other words, we can be quite sure that the Joint Evidence Committee of the Church of England League, and the National Protestant Church Union, the Church Association, and the Rev. the Hon. W. E. Bowen (who between them supplied the evidence in regard to nearly all of the 559 churches under criticism) did their work with thoroughness, in the sense that the case against extreme ritualism was made as strong as possible.

The Commissioners then give a Historical Survey of the circumstances under which "usages, which are apparently inconsistent with the rules of the Church of England," have developed and become habitual.

They preface this Historical Survey by asserting that it is "to the wholesome reaction against . . . the slovenliness of Divine service in the early decades of the 19th century" (which was a consequence of the widespread laxity of ritual observance during the century and a quarter which elapsed before the death of Queen Anne and the accession of Queen Victoria), "that we must trace the origin of changes which have culminated in the irregularities of an opposite sort," which were brought before them, and admit that "the men to

whose ritual action exception was first taken, say between the years 1830 and 1850, were, for the most part, engaged in a simple endeavour to restore the orderly observance of rubrics."

In the course of this long and carefully-compiled Historical Survey the Commissioners allude to the following:—

(1) The case of Westerton v. Liddell, which was heard in 1854, and went before the Diocesan Court, the Provincial Court, and the Judicial Committee of the Privy Council, in turn. It declared legal the use of the Credence Table, of coloured altar frontals, of the Cross upon the Chancel Screen, and of the Cross, when placed before the altar, but not when placed upon it. It also gave an interpretation of the ornaments rubric, which was construed as declaring legal the use of the special eucharistic vestments.

(2) The case of Martin v. Mackonochie, which was heard before the Court of Arches and the Judicial Committee of the Privy Council in 1868. This case (in so far as not subsequently overruled) declared the illegality of the elevation of the elements; of genuflection during the consecration prayer; of altar lights; of the ceremonial use of incense; and of the ceremonially mixed chalice.

(3) That of the Rev. John Purchas, which was heard before the Court of Arches in 1870, and before the Judicial Committee in 1871. The judgment in the latter case (in so far as not subsequently overruled) declared the use of wafer bread, and of special eucharistic vestments, and also the adoption of what is known as the Eastward Position, as all

illegal. The Purchas case was undefended before the Judicial Committee, and caused great consternation among churchmen of all grades. It not only overruled the decision in Westerton v. Liddell in regard to vestments, but by its condemnation of the Eastward Position, led to a memorial of protest signed by 4,700 clergy. In the Commissioners' opinion the Purchas case led also to an increase of the condemned ritual usages, and is the starting point of the deep-rooted objections which now exist to the Judicial Committee as a court of appeal in ritual matters.

This, again, is a significant admission to make.

(4) The Ridsdale case, which was heard in 1875 before Lord Penzance (who held the position of judge under the Act of 1874, and also that of Dean of the Arches), and before the Judicial Committee in 1877. This case declared the illegality of the special eucharistic vestments (confirming the decision in the Purchas case on the point); and of wafer bread (with a slight modification of the law on the point as laid down in the Purchas case). It completely overruled the Purchas case on the question of Eastward Position, by declaring it legal if it did not render the Manual Acts invisible to the congregation properly placed.

(5) The "Lincoln case," in which Dr. King, the Bishop of Lincoln, was charged as a prominent high churchman with certain ritualistic practices.

The case was heard in 1890 before Archbishop Benson, and in 1892 before the Judicial Committee.

The decisions at both hearings were identical (1) in declaring legal the non-ceremonial mixing of the

chalice (i.e., not during the service); the Eastward Position; and the singing of the Agnus Dei; and (2) in forbidding the Signing of the Cross when giving the Absolution or the Benediction. The Archbishop, moreover, declared the use of two altar lights during Holy Communion legal, if the candles were lighted before the service began, whilst the Judicial Committee pronounced no opinion on the point.

(6) What is known as the "Lambeth opinions," delivered in 1899 and 1900 by the Archbishops of Canterbury and York, on the question of Incense, Processional Lights, and Reservation. In the first opinion the ceremonial use of incense and of processional lights was declared illegal, and in the second opinion Reservation, in any form, of the consecrated elements was also declared illegal.

(7) The various occasions upon which the subject of ritual excesses came before Parliament in an abortive manner between the years 1899 and 1903.

The Commissioners make the noteworthy admission that the growth of dislike and hostility to the Judicial Committee as a Court of Ecclesiastical Appeal, and "the notion that the Bishops must be guided thereby in giving their own decisions had tended . . . towards the disregard of authority, and to an increasing habit on the part of the clergy to act in ritual matters on their own individual discretion, or on the advice of irresponsible partisan societies."

The Commissioners next proceed to discuss the "causes of the failure to check irregularities and suggested remedies."

They preface their remarks on these matters by pointing out the obvious fact, that in proportion as the requirements of the law are minute, so the range of possible disobedience is increased. That in consequence, what they call the theory upon which the Acts of Uniformity were passed (i.e. "that the public worship of the Church of England should be regulated by one fixed standard, laid down once for all, and to be maintained in all places, and for all time") has never been carried out in practice.

They then give what may be classified as four main causes of failure to check irregularities as follows:—

(1) "The inclination characteristic of the temper of the 16th century to ignore all varieties of feeling and opinion existing among men of the same generation, and to make no provision for changes of feeling and opinion as one age succeeded another."

(2) The present structure of the whole ecclesiastical judicature, and particularly the constitution of the Court of Final Appeal for ecclesiastical causes.

(3) The fact that the judgments of the Courts might be enforced by penalties so unsuitable, that their infliction is an offence against public opinion.

And (4) The want of administrative action by, and the refusal of, the Bishops to take coercive measures in the Ecclesiastical Courts.

In regard to (1) they assert "in the sixteenth century, when the requirements of uniformity in the Church of England received the form which it has ever since retained with little alteration, the ideas of religious liberty and toleration were in Church

and State alike unrecognised if not indeed unknown. In Church and State alike these ideas have now won their way to undisputed prevalence," and that the result has been at all times a widespread disobedience to the letter of the law, which has been acquiesced in formerly in regard to one class of offences (i.e. "the omission" type) to such an extent, that it has now become difficult to obtain obedience in respect to another class of offences (i.e. those which err in the direction of excess).

With all due deference we wish to say that some of these statements must seem rather wide of the mark and extremely surprising to many people.

It is of course true, that conformity to the Prayer Book was always, both in the 16th century and much later, enforced under heavy penalties, and that this apparent severity gives support to the Commissioners' statements about religious liberty and toleration. Let us, however, quote freely from a standard authority to shew what widely different views on these matters are held by other people of learning.

In Proctor and Frere's "New History of the Book of Common Prayer," 1902 edition, at page 674 et seq.: we find the following:—

"Perhaps the most prominent feature of all is the representative character of the Book (the Prayer Book), it has drawn from many sources; apart from the Bible, the old traditional Latin services of the English Church have provided by far the greater part of the contents, this is not merely true of actual bulk, but is still more markedly true of the whole spirit and method of the Prayer Book; it has

drawn also from other sources—Greek, Gallican, Lutheran and Swiss in their measure, but nowhere is the Catholic temper of the book better shewn than in the treatment of the matter which is adopted from 16th century sources, such as The Consultation or the suggestions of Bucer, and even when the borrowing has been most extensive, there are still the clear signs of careful editing, and the excision of what might sound out of tune with the old devotional temper, preserved in the traditional prayers of the Church.

While thus the Prayer Book has combined "things new and old," it has also been comprehensive in another sense: it has attempted, and to a large extent been enabled, to combine together in common worship schools of thought which, while united upon the fundamentals of the faith, differ, and even differ widely, on matters of theological opinion. This is no fortuitous result of the play of events, but was clearly the deliberate purpose alike of the original compilers of the Prayer Book, and of the revisers who at the various stages carried on their work.

It was no small testimony to the excellence of the first Prayer Book, that it won acceptance, and even some measure of approval, from the leaders of the old learning. In 1552 the object of the revision was to comprehend the opposite extreme, and the insertion of the Black Rubric shows how the State was anxious to outstrip the Church in comprehensiveness, and even make room for those who were really contending for views which were antagonistic to the Catholic Faith.

When the choice had to be made, at the opening of Elizabeth's reign, between the two Edwardine books, it was a choice between two different forms of comprehension; but even when it was seen that the second book would command more support in the country than the first, it was not adopted without further attempts made to comprehend those who would like it least, e.g., by the omission of the Black Rubric, and the petition against the Pope, and by the addition of the Ornaments Rubric. The Conferences at Hampton Court and at the Savoy were still more obviously designed to facilitate comprehensiveness."

Thus, according to these statements, the keynote of the English Prayer Book, from its inception to the last of its numerous revisions, has been "comprehensiveness" or "Catholicity." Compare this with the Commissioners' statement, that the theory on which the Acts of Uniformity were based was, that "the public worship of the Church of England should be regulated by one fixed standard laid down once for all, and to be maintained in all places and for all time." Uniformity, of course, it was intended there should be, in the sense that each diocese should no longer have its own peculiar use, but that all should have in main outline the same use. This uniformity of use, however, as evidenced in the Prayer Book, permits, and has always permitted, of a considerable latitude in regard to details of services and ritual in general. Many points were purposely passed over in silence, and many rubrics being vaguely worded by deliberate intent.

We have quoted at considerable length from

Proctor and Frere's book because this "New History of the Book of Common Prayer" is no mere hole and corner partisan production, written to uphold the idea that the Prayer Book is capable of one scheme of interpretation and one only. It is a standard work which has stood the test now of more than half a century, has been reprinted on more than twenty occasions, and is one which upholds the Catholicity and comprehensiveness of the Prayer Book.

The most prejudiced critic, who would not perhaps admit that the Acts of Uniformity spell "comprehensiveness," will hardly deny that, in the light of history, the Prayer Book of 1552 was simply and wholly a "compromise," and that this compromise was taken as the basis of the Elizabethan Prayer Book. Here, then, at any rate, are two of the 16th century Prayer Books with "compromise," if not actually "comprehensiveness," as their keynote. Compromise, moreover, is a word which represents a very different policy indeed, to that in which liberty and toleration are "alike unrecognised if not indeed unknown."

In regard to what we have classified as the second cause of failure to check irregularities as stated by the Commissioners, the latter assert, that "much attention has been devoted during the last generation to the subject of ecclesiastical judicature generally. . . . There has resulted a clearer perception of the functions which are appropriate to a court exercising the Royal Supremacy in ecclesiastical causes; . . . It is recognised that the authority exercised by this court is that of the

Crown, and not that of the Church. Without being itself a Church Court, and without pretending to possess spiritual jurisdiction, it has the duty of revising, where necessary, judgments given in Church Courts possessing spiritual jurisdiction."

If this means that such a court has the duty of revising judgments given in Church Courts in spiritual or ritual suits (an interpretation which the action and claims of the Judicial Committee ever since its creation fully supports), then we say with all respect that it appears to us the Commissioners are attempting to make a distinction without a difference.

If a court does not pretend to possess spiritual jurisdiction, how can it legally exercise such a jurisdiction by acting as a final Court of Appeal in spiritual cases?

They then proceed to quote in support of their last mentioned statements (inter alia) from the Report of the Ecclesiastical Courts Commission of 1883; from the preamble of 24 Henry VIII. c. 12 mentioned above; (this last, far from supporting the Commissioners' statement that a court exercising the Royal Supremacy in ecclesiastical causes, without being itself a Church Court or pretending to possess spiritual jurisdiction, has the duty of revising the judgments of Church Courts; appears to us to flatly contradict it) from Article XXXVII.: (This, however, gives the Crown no right to judge purely spiritual causes by lay officials,) and from Queen Elizabeth's draft "Declaration of the Queen's proceedings since her reign," in which she disavowed any superiority to

herself to "define, decide, or determine any article or point of the Christian faith or religion, or to change any ancient rite or ceremony of the Church," or to "challenge or use any function or office belonging to any ecclesiastical prelate or person of any degree soever." This again appears to flatly contradict the Commissioners' line of argument.

They finally state, that they consider "that the constitutional position which the Final Court ought to occupy" should be as follows:—

(1) "It should be open to any party who conceives himself to have been denied justice in any Ecclesiastical Court, to appeal to the Crown for remedy."

(2) "This appeal to the Crown should be dealt with by a court consisting of persons commissioned by the Crown, and armed with the power of the State, whose function it should be to enquire whether the Church Courts . . . .have properly exercised their authority."

(3) "In hearing an appeal the Crown Court should decide all questions of fact in contest between the parties, including the proper construction of words and documents (if any), which are the subject matter of the complaint."

(4) "For the purpose of deciding whether the facts so ascertained establish that an offence against the doctrine or discipline of the Church of England has been committed, the Crown Court, when any question arises not governed by statute or other documents having the force of an Act of Parliament, ought to act on the advice of the Spirituality, which

for this purpose is represented by the Bishops." We submit this method of acting on the advice of the Spirituality which the Commissioners suggest the Crown Court should adopt, is essentially and fundamentally a different thing to what the Statute of Appeals meant when it stated, that "any cause of the divine law or of spiritual learning" should be "declared interpretated and showed by the Spirituality."

Their suggestion, therefore, we contend, is, if not a direct violation of the principle of that statute, at any rate an evasion of it.

There is surely the clearest distinction between the Spirituality merely advising a Crown Court how to act, on the one hand, and declaring, interpretating, and showing a cause, on the other. It means, of course, all the difference between the Bishops as mere assessors in the one case, and as the actual judges of the court in the other.

The Commissioners bring forward the preamble of the Statute of Appeals to support their case. We contend, however, that, far from showing that the Bishops are there referred to as mere assessors, the principle is clearly laid down that in spiritual and doctrinal matters ("any cause of law divine or of spiritual learning") the Spirituality are themselves to constitute the Crown Court. As a matter of fact, however, as we have tried to show in Chapter II. (above), the actual constitution of that Final Court of Appeal in purely spiritual and doctrinal matters was never actually and legally determined. Neither the Court of Delegates, nor the Court of High Commission constituted such a court. The only

attempt, we contend, that was ever made to actually define how the Spirituality were to act as a final court of spiritual appeal was the abortive attempt made in the "Reformatio Legum Ecclesiasticarum" to constitute a committee of the Upper House of Convocation the final Spiritual Court.

Moreover, there is, we contend, another important point which the Commissioners appear to have overlooked.

This is, that even if their suggestion that the Bishops are merely to be called in as assessors, to decide questions which are "not governed by Statute or other documents having the force of an Act of Parliament," were a fair and equitable one (which we deny), yet the fact remains that both the Prayer Book (by the Act of Uniformity), and the Thirty-nine Articles (by statutes 13 Elizabeth c. 12, and 28 and 29 Vic. c. 122), have received the sanction of Parliament. As such they would come under the description of "documents having the force of an Act of Parliament."

Thus their proposals come to this, that Churchmen would have to consent to have these most important documents construed by lay judges, who may be Churchmen, but are not necessarily versed in ecclesiastical law. The application of strict legal methods of constriction to Prayer Book rubrics is quite unworkable, and unsuitable. This, we argue, has already been proved in the history of the Judicial Committee, and the plan would never in the future, any more than in the past, be agreed to by the bulk of the English Church. Thus it is futile, and offers no new principle. We observe,

however, that the Commissioners immediately afterwards feel compelled to admit that, "The great lay judges who usually and suitably compose the Crown Court, neither occupy such an official position in the Church of Christ as would give spiritual authority to their decisions, nor possess as a necessary qualification of office any special training in religious learning. It is reasonable, therefore, that whenever the need arises they should turn to those who, according to the constitution of the Church, have been appointed to be her chief teachers, and who, in fact, possess the knowledge requisite to enable them to be so."

Here then is a plain straightforward admission of the true principle of the matter.

However, the application of it is simultaneously hampered by their proposals, which relegate to the mere position of "assessors," the men who (in their own words) possess the knowledge requisite to enable them to be the chief teachers of the Church. They deny them, moreover, even the humble and subordinate position of assessors, when the question is governed by statute, or rather document having the force of an Act of Parliament (a definition which we have seen includes the Prayer Book and the Articles).

To proceed with the gist of the Commissioners' Report we read that "The Court of Delegates from 1553 to 1832, and the Judicial Committee of the Privy Council from 1833 to the present time, have exercised the final appellate jurisdiction of the Crown in ecclesiastical causes.

There has been no difference in principle between

the two. Both have been courts acting solely under the authority of the Crown. Both have dealt with appeals from Church Courts, and so far as is known with all sorts of such appeals. . . . . Though, so far as is known, few cases of doctrine or ritual came before the Court of Delegates, the Judicial Committee has heard several important appeals involving such questions. In deciding these cases the Judicial Committee has acted . . . without seeking to obtain the opinion of the Bishops as a body. Individual Archbishops and Bishops formerly sat in some cases as members of the court, and since 1876 have sat with the court as assessors."

Thus, though they assert that the Court of Delegates and the Judicial Committee have had no difference in principle, yet they admit that their methods of procedure have been widely different. The latter has freely acted as a Court of Appeal in spiritual matters, and without even taking the opinion of the Spirituality as provided by that construction of the Statute of Appeals which is most favourable to the existence of a lay Court of Final Appeal. However, as we contend, the true construction of the Statute of Appeals is not that the Final Court of Appeal in Spiritual matters should be a lay court with power to consult the Bishops as assessors. It is, on the contrary, that this court should be itself a Church Court composed of ecclesiastics, e.g., a committee of the Upper House of Convocation, as suggested by the *Reformatio Legum Ecclesiasticarum*.

They then assert that "It does not appear that

similar action of the Court of Delegates, if it occurred, excited attention, much less opposition. It must be remembered that bishops and canonists were more numerous and more prominent in the Court of Delegates in the sixteenth and seventeenth centuries than they have been in the Judicial Committee. Moreover, the distinction between officers of the State and of the Church was less sharply drawn in the days when the former were necessarily members of the Church, and high offices of State were sometimes held by ecclesiastics. . . . But from the time of the Gorham litigation (1850), and even from an earlier date, there has been . . . a continuous and growing objection to the Judicial Committee of the Privy Council as the Court of Final Appeal in matters of doctrine. . . . The series of Privy Council judgments which was given between the years 1868 and 1877 . . . extended to cases of ritual, the objection which was felt to the Judicial Committee deciding questions of doctrine."

It may, perhaps, help to make matters quite clear if we here state again clearly what our contention is. We admit that the Judicial Committee stands as the modern successor of the Court of Delegates. We assert, however, that the latter was never intended at the time of its creation to be, nor could it from its constitution be a Court of Appeal, in either doctrinal or ritual matters, i.e., truly spiritual cases, and that it never, except by an unconstitutional misconception of its functions, acted in such a capacity. Therefore the action of the Judicial Committee in hearing purely spiritual cases, is

equally a misconception of its jurisdiction. Such jurisdiction was never contemplated by its creators; nor claimed for the Court of Delegates whose successor it professes to be.

"The result (the Commissioners add) has been unfortunate in many ways. Bishops and others have been naturally slow to appeal to a court, the jurisdiction of which was so widely challenged, clergymen have . . . asserted the duty of disobedience to the decisions of a tribunal, the authority of which they repudiate, and judgments of the Judicial Committee . . . are treated as valueless. . . . A Court dealing with matters of conscience and religion must, above all others, rest on moral authority if its judgments are to be effective, as thousands of clergy with strong lay support refuse to recognise the jurisdiction of the Judicial Committee its judgments cannot practically be enforced. . . . The establishment of a Court, the authority of which could not be disputed, would destroy any foundation for the claim now, in fact, made by a section of the clergy, to decide for themselves the limits of canonical obedience."

The Commissioners certainly state most frankly and clearly the objections to the Judicial Committee, and also admit the principle upon which a court of Final Appeal in spiritual matters must be constituted. They do not, however, apply these principles in their recommendations. They then enumerate and discuss several reasons which, in the opinions of the witnesses who appeared before them, hinder the effectiveness of the Provincial and Diocesan Courts,

and state that it would be wise to adopt some of the recommendations of the Ecclesiastical Courts Commission, with regard to Provincial and Diocesan Courts.

They summarise these recommendations (so far as they desire to adopt them) as follows:—

"The Diocesan Court is to consist of the Bishop and a Legal Assessor. . . . In cases of heresy or breach of ritual . . . the Bishop must sit in person, with a Theological Assessor in addition to the Legal Assessor. The Bishop may . . . send a case direct to the Provincial Court if both parties consent. An appeal shall lie from the Diocesan Court to the Court of the Province.

"In the Provincial Court, in cases of heresy or breach of ritual, the Archbishop is to determine in each case whether he will leave the case for the decision of his Official Principal, or will hear it himself. If he adopts the latter course, the Official Principal must sit with him as Legal Assessor, and the Archbishop . . . may appoint . . . any number of Theological Assessors not exceeding five . . . . An appeal shall be from the Provincial Court to the Crown, and the Crown shall appoint a permanent body of lay judges to whom such appeals shall be referred. Every person so appointed shall, before entering on his office, declare that he is a member of the Church of England . . . The number summoned for each case shall not be less than five, who shall be summoned by the Lord Chancellor in rotation.

"When . . . the judgment of the Church Court is to be varied, the case shall be remitted to

the court whose judgment is appealed against, in order that justice may be done therein according to the order of the Crown."

They then add to these recommendations the following: "In the case of any appeal raising questions of doctrine or ritual which, in the opinion of the Court, are not governed by the plain language of documents having the force of Acts of Parliament, but which questions involve the doctrine or use of the Church of England proper to be applied to the facts found by the Court, the opinion of the Archbishops and Bishops of the two Provinces should be taken, upon questions submitted to them by the Court, and such opinion should be final and conclusive for the purposes of the appeal," and state that a declaration of the law by a court so constituted and advised would secure the obedience of the Church, and that if these recommendations were carried out, the Church Discipline Act 1840 would require modification.

We have already criticised the principle of these suggestions. The Commissioners practically admit that the Spirituality, as represented by the Bishops, are the true final authority in doctrinal matters, as evidenced by the Statute of Appeals. They admit that "a court dealing with matters of conscience and religion must, above all others, rest on moral authority, if its judgments are to be effective." They, moreover, clearly admit all the alleged objections to the Judicial Committee as a Court of Appeal in purely spiritual matters.

Yet, as we see from their recommendations, the

new court, which they think will be free from the objections which exist in the case of the Judicial Committee, is in no way an improvement.

They admit that on some few occasions individual bishops have sat as members of the Judicial Committee, and on frequent occasions as assessors, and that "bishops and canonists were more numerous and more prominent in the Court of Delegates . . . . . than they have been in the Judicial Committee." Yet this Court of Appeal, which they recommend as suitable for all cases, including matters of doctrine and ritual, is to be entirely constituted of lay judges. The only connection the Bishops have with it is, that in cases which are not governed by documents having the force of Acts of Parliament (including the Prayer Book and the 39 Articles) the Bishops may give their opinion as Assessors. How, then, is this an improvement on the Judicial Committee or the Court of Delegates as a Court of Appeal for all cases, including purely spiritual causes?

It would seem that, under the suggested new system, the Spirituality (as represented by the Bishops) would have even less say in the matter than before, under the rule of the Judicial Committee. It is quite remarkable how the Commissioners admit the correct theory and principle upon which the Final Ecclesiastical Court should be constituted, and yet in practice contradict both.

They appear to give with one hand and take away with the other!

They then go on to deal with the question of the

episcopal veto as follows:—"Prior to the Church Discipline Act, 1840, the Ecclesiastical Courts were open to any person . . . provided he were solvent, and not actuated by unworthy motives, and the matter was one of ecclesiastical cognisance." They refer to the discretions and vetoes conferred on bishops by the Church Discipline Act, 1840, the Public Worship Regulation Act, 1874, and the Clergy Discipline Act, 1892.

They add: "All suits against clergymen for ecclesiastical offences must be brought under one ~~or other~~ of the above Acts. The Benefices Act, 1898, provides machinery, which the Bishop can set in motion at his discretion, for dealing with the inadequate discharge of ecclesiastical duties by an incumbent." They state that, at least so far as the Public Worship Regulation Act is concerned, it was not intended that the Bishops should be confined to the mere question whether there had been an infraction of the law, but that they should have a wide discretion to consider the interests of the Church in the matter. In exercising this discretion the Bishops have acted on the principle of declining to allow a clergyman to be prosecuted who was willing to obey his bishop. They add that this course did not in itself tend to discourage breaches of the law, and that it is certain that the failure of the ritual suits 30 years ago, created an impression that such efforts to reprove ritual irregularity were hopeless. That the necessity of some power to control freedom of prosecution is largely dependent on the present system, which makes even the

least departure from the standard laid down by the Acts of Uniformity an ecclesiastical offence. That a preliminary consideration of the complainant's case by some court or judge, might give adequate protection in cases of idle or frivolous prosecution, yet it would be impossible for a judge to have regard to these wider grounds, such as the general good of the Church, which have been judicially declared to have been properly regarded by a bishop. That on this ground it would not be practicable to transfer the power of veto from the Bishop to a court. That, on the other hand, to deny a man who has a complaint the opportunity of stating it before the only tribunal which can give him redress, is so grave a matter that the abolition of the episcopal veto is desirable if it can be accomplished without risk of injustice. That the relaxation of the requirement of rigid uniformity in the rites and ceremonies of public worship, and the allowance of reasonable variety, would make such abolition possible.

This all sounds plausible, but there is another side to the question. The existence of the episcopal power of veto is surely a practical illustration of the fact that the catholic principle exists, and is recognised by the State, that the Bishop and the Bishop alone is the proper authority to control the discipline of the clergy. This principle was asserted and maintained in the case of Julius v. the Bishop of Oxford (1880, 5 A.C. 214). Lord Selborne, in delivering his judgment, stated that he could not make the assumption that the public must always have an interest in the punishment of

every clergyman offending against any part of the ecclesiastical law, and that the appellant's case rested necessarily on that assumption.

On the whole there seems little doubt that the episcopal veto has done much good. The Bishop can naturally exercise his pastoral authority with his clergy much more effectively before a prosecution is started than after it has begun.

If a prosecution can be commenced in spite of his better judgment, that authority is seriously handicapped, and the Bishop's inherent personal jurisdiction is *ipso facto* ignored, and ignored wrongfully.

In conclusion, on this point, we note that the Commissioners preface their recommendations with the proviso that those of them which require legislation "are formed as a complete scheme and must be considered mutually dependent," and that consequently their proposed abolition of the veto depends on such an alteration of the law, as will secure greater elasticity, and such a reformation of the courts, as will give them authority over the consciences of Churchmen. If these important reforms were effectively carried out, "with the consent and authority of the Church" the veto would then practically be no longer necessary.

To proceed with the Commissioners' report; they say: "The remedies which we propose cannot be carried into effect without legislation, and we assume that, before any Bill for this purpose is brought before Parliament, its provisions will have received the consent and authority of the Church

ascertained by constitutional means." There is here, we note, a trace of recognition of the principle that ecclesiastical legislation should originate in Convocation and not in Parliament, but it is surely imperfectly stated. Why do not the Commissioners carry the principle to its logical conclusion and say that any legislation of the kind should take its origin, first as a Canon drawn up and passed by Convocation, and then merely referred to Parliament for confirmation?

They next proceed to consider what we have classified as the fourth cause of failure to check irregularities, viz., the inaction of the Bishops, and state that the Bishops "have never as a body been in favour of litigation as a practical means of dealing with them. . . . It is with reference to ceremonies and ornaments that the Bishops' action in recent years has been most affected by the difficulties which the rigidity of the Acts of Uniformity has created . . . bishops . . . have made constant efforts to bring about that measure of conformity with the Book of Common Prayer, which they believed to be the utmost they could effectually or equitably require, and the influence thus exerted has, we believe, been far greater than is commonly realised. But there has not been the same disposition to insist upon obedience to the law of the Church of England as declared by the Courts. Some bishops, indeed, have stated in their evidence that, disagreeing with the judgments in some of the well-known ritual suits, they regard themselves as justified, in existing circumstances, in allowing the clergy to adopt

or continue certain practices which these judgments declare to be illegal." This brings us back once more to Cause 2, the present structure of the Ecclesiastical Judicature and of the Final Court in particular.

The Commissioners deal next with the methods of compromise, which Bishops Creighton, Ingram, and Talbot have been driven to adopt, by the exceptional difficulties of the situation, in regard to the use of Incense, Portable Lights, Reservation and other matters. They continue: "In our view the real remedy is (1) the substitution of a carefully defined elasticity for one fixed standard of rites and ceremonies; (2) a power vested in the Bishops, as a body, of authorising special services and prayers, and of regulating the use of hymns and anthems; (3) reservation to the office of the individual Bishop, of a due power of control within the limits thus determined. It has been urged before us that the Bishops might do much to stop illegal practices, by refusing to institute to a benefice a presentee whose antecedents render it practically certain that he will, if instituted, disobey the law. . . . We think, that if the Bishop's power in this respect were rendered clearer and larger, the refusal to institute should be steadily maintained in all cases of grave irregularity."

The Commissioners next mention the following matters, which are dealt with more particularly in their recommendations:—The wilful disobedience of sentences passed upon incumbents by the Church Discipline Act, 1840; the removal of ornaments placed in churches without a faculty; the

great unworkable size of many dioceses; and the more effective use of Episcopal and Archidiaconal Visitations and Rural Deans' Inspections of Churches.

They then express themselves as follows:—"There can, in our opinion, be no doubt of the wisdom of reserving the employment of legal coercion for grave cases which do not yield to milder measures. We think, however, that occasions have arisen more often than has been realised by the Bishops when . . . . discipline should be enforced by action in the Ecclesiastical Courts. . . . If such attempts failed, the case for reorganisation of the Ecclesiastical Courts would be strengthened. But the fact that reforms are needed is not an adequate reason for allowing defiant lawlessness to go unchecked, pending their adoption."

This takes us back once more to the same question of the reconstruction of the Ecclesiastical Judicature. So long as we have a court, which even many of the Bishops do not recognise as possessing any true spiritual authority, it seems useless to declaim in this matter. It has already been proved by experience that discipline cannot be enforced by the Courts as at present constituted. Moreover, until we have a Final Court which can declare with unimpeachable spiritual authority precisely what teaching has been in fact repudiated by the Church of England, it is surely premature to talk of defiant lawlessness. We are not in a position, under the present system, to say definitely and authoritatively, even in regard to matters

which have been judicially dealt with, that the defiant person is anything more than a technical law-breaker, with a conscientious belief that he is morally in the right.

They then proceed: "Among the practices which we have already distinguished as being of special gravity and significance will be found the following:—

(a) The interpolation of the prayers and ceremonies belonging to the Canon of the Mass;

(b) The use of the words, 'Behold the Lamb,' accompanied by the exhibition of a consecrated wafer or bread;

(c) Reservation of the Sacrament under conditions which lead to its adoration;

(d) Mass of the Prae-Sanctified;

(e) Corpus Christi processions with the Sacrament;

(f) Benediction with the Sacrament;

(g) Celebration of the Holy Eucharist, with the intent that there shall be no communicants except the Celebrant;

(h) Hymns, prayers, and devotions involving invocation of, or confession to, the Blessed Virgin Mary, or the Saints;

(i) The observance of the Festivals of the Assumption of the Blessed Virgin Mary, and

(j) Of the Sacred Heart;

(k) The veneration of images and roods;

(l) Any observance of All Souls' Day, or of the Festival of Corpus Christ, which inculcates or implies 'the Romish doctrine concerning Purgatory,' or transubstantiation."

We have no wish to go out of the way to defend any of these practices which the Commissioners distinguish as being of special gravity and significance.

We wish, however, to point out, that in the absence of such an authoritative prohibition in each case, as would appeal to the consciences of churchmen, it is possible for churchmen of extreme views to conscientiously believe, and to contend, with some plausibility, that of these practices (a) consists merely of inaudible private devotions of the priest, whilst (b) is merely used as a signal to indicate that the time for intending communicants to receive the Sacrament has arrived. That in regard to (c) there is no question (as the Commissioners admit) about the antiquity of Reservation,* for the communion of those not present at the Celebration in church, but from the 4th century onwards, to avoid abuses, its use was restricted to the sick. In the English Prayer Book of 1549, Reservation for the sick was expressly permitted, and the only express prohibition of Reservation for any purpose consists in the opinion of the Archbishops at the Lambeth Hearing. This opinion should, of course, be morally binding upon all loyal churchmen, yet it was not that of an Ecclesiastical Court, and has strictly no authority, beyond that of the personalities of the men who uttered it. Moreover, many bishops approve of and permit Reservation.

Therefore it is quite possible for individual members of the Church to believe conscientiously

*It dates from early in 2nd century (Justin Martyr) Apol. 1. lxvii.

that Reservation is not strictly illegal, and that the question of whether the circumstances of Reservation are such as may lead ignorant people to the adoration of the Consecrated Elements is beside the point.

That in regard to (d), the Commissioners also admit the antiquity of the practice of holding a service with the Reserved Sacrament. Therefore, that in regard to (c) and (d), and also in regard to (i), the Festival of the Assumption, and (l) that of All Souls' (the antiquity of both of which the Commissioners admit) as the Bishops in 1851 stated in their joint pastoral letter: "The principle has been avowed and acted upon . . . that as the Church of England is the ancient Catholic Church settled in the land before the Reformation, and was then reformed only by the casting away of certain strictly defined corruptions, therefore, whatever form or use existed in the Church before its reformation, may now be freely introduced and observed, unless there can be alleged against it the distinct letter of some formal prohibition." We shall have occasion to revert to this principle more than once, and shall refer to it as the "argument from ancient usage."

In other words, it is possible to argue, as many people do, that "omission" does not necessarily imply "prohibition" until some constitutional ecclesiastical authority which will appeal to the consciences of churchmen, declares that it does so.

That in regard to (h) and (k), Article XXII. abolishes not all veneration of images and roods, and not all invocation of the Blessed Virgin Mary

and the Saints, but merely "the Romish doctrine concerning Worshipping and Adoration as well of Images as of Reliques, and also Invocation of Saints." Thus they would contend, that whilst it forbids such prayers as "miserare nos," which ask from the Saints such gifts of grace as God only can bestow, thus infringing the Divine prerogative, it does not in any way forbid the prayer "Ora pro nobis," which is quite unobjectional. Still less does it forbid the practice of "Comprecation," which consists in asking God to hear the intercessions of the Saints on our behalf, i.e., such Litanies as that used in St. Columba's Church, Kingsland Road, which contains suffrages like the following :—

"By the prayers and intercessions of the Blessed Virgin thy Mother, and of all the Saints, Lord have mercy upon us."

It is quite possible, therefore, for churchmen of advanced views to conscientiously believe that none of the following—(a), (b), (c), (d), (h), (i), (k), and (l)—have yet been conclusively shown to be illegal.

CHAPTER V

Summary and Criticism of the Royal Commissioners' Comments and Recommendations. *(Continued.)*

THE Commissioners conclude their Report with their Conclusion and their Recommendations in specific form.

They begin their "Conclusion" as follows:—"Our consideration of the evidence laid before us has led us to two main conclusions. First, the law of public worship in the Church of England is too narrow for the religious life of the present generation. It needlessly condemns much which a great section of Church people value. . . . In an age which has witnessed an extraordinary revival of spiritual life and activity, the Church has had to work under regulations fitted for a different condition of things, without that power of self adjustment which is inherent in the conception of a living Church. . . . The result has inevitably been that ancient rubrics have been strained in the desire to find in them meanings which it has been judicially held they cannot bear, while on the

other hand, the construction placed on them in accordance with legal rules has sometimes appeared forced and unnatural. With an adequate power of self adjustment, we might reasonably expect that revision of the strict letter of the law would be undertaken with such due regard for the living mind of the Church as would secure the obedience of many, now dissatisfied, who desire to be loyal, and would justify the Church as a whole in insisting on the obedience of all."

The condition of affairs which is truly depicted in this paragraph is the result, surely, of the manner in which the State has hampered the Church.

Parliament temporarily suppressed the proper legislature of the Church, viz., Convocation, and when the latter had been revived, Parliament again has ousted it from its true position of an ecclesiastical legislative body.

Thus laws have never been revised and altered as they would have been had what, we contend, is the Church's true Legislature been allowed to do its work; the result has been inelasticity of the law, and the undue straining of rubrics in the effort to make up for it.

They continue:—"Secondly, the machinery for discipline has broken down. The means of enforcing the law in the Ecclesiastical Courts even in matters which touch the Church's faith and teaching are defective, and in some respects unsuitable."

This, too, would seem to have followed naturally from the hampering action of the State in appointing non-spiritual courts, which have usurped spiritual authority.

"Although attempts to deal administratively with ritual irregularity have been made they have been unsuccessful, largely because, in regard to the rites and ceremonies of public worship, the law gives no right or power to discriminate between small and great matters.

"It is important that the law should be reformed, that it should admit of reasonable elasticity, and that the means of enforcing it should be improved. . . . If it should be thought well to adopt the recommendations we make in this report, one essential condition of their successful operation will be that obedience to the law, so altered, shall be required and, if necessary, enforced by those who bear rule in the Church of England."

We have already, we hope, made it fairly clear, and hope to make it yet still clearer, that those who bear rule, the Bishops, are hampered in their good intentions by the two facts above mentioned. We refer, of course, to the facts, that the Church has neither its own true Legislature to make and revise its laws, nor its own Final Court of Judicature (which of course governs all the minor courts) to interpret them. As the result, there is at present no spiritual authority to make, amend, or interpret the law. Thus, neither those who bear rule in the Church, nor any of the lesser Churchmen, have any authority they can use as a guide, or conscientiously obey. This, of course, is the root of the whole matter. From beginning to end, as we shall hope to show, the present legal troubles of the Church are mainly attributable to these facts.

The Commissioners finish their "Conclusion"

with the following:—"We desire to place on record our conviction . . . that in the large majority of parishes the work of the Church is being diligently and quietly performed by clergy who are entirely loyal to the principles of the English Reformation, as expressed in the Book of Common Prayer."

The Report concludes with the Commissioners' Recommendations as follows:—

"Those of our recommendations which will require legislation, are framed as a complete scheme, and must be considered mutually dependent. We recommend that:—

(1) The practices to which we have referred as being plainly significant of teaching repugnant to the doctrine of the Church of England, and certainly illegal, should be promptly made to cease by the exercise of the authority belonging to the Bishops, and, if necessary, by proceedings in the Ecclesiastical Courts."

As explained above, the Bishops have under the present circumstances no such effectual authority, and the Courts, as at present constituted, are quite incapable of giving them such an authority. In our opinion, therefore, this suggestion plainly cannot be carried out.

Under the present system of Parliamentarily made laws, and Parliamentarily appointed courts, which few Churchmen respect or observe, experience has clearly shown that practically nothing can be done to make either these or any other practices promptly cease. About the most the Bishops can do is what they have done in the past, i.e., they can refuse to license assistant clergymen to the parishes where

alleged objectionable and illegal practices obtain, and they can also put the parishes under discipline, which means that they do not personally visit them, either for confirmations or for any other purpose. This, of course, is not nearly a powerful enough weapon with which to coerce men into obeying an authority, which they conscientiously repudiate as entirely non-spiritual, i.e., Parliament.

If the Church of England made her own laws and really governed herself, the laws would be such that no man could conscientiously disobey and also remain in her orders or in communion with her. If, however, there remained a few offenders so ignorant or prejudiced as to attempt this, the Church, with free powers of self-government, would quickly give her bishops power to deal with men of this class effectually. The immediate trouble, however, is, that the present offenders have real grievances and genuine conscientious objections, and the Bishops both know this and partly sympathise with it.

(2) "Letters of Business should be issued to the Convocations with instructions (a) to consider the preparation of a new rubric regulating the Ornaments (that is to say, the vesture) of the ministers of the Church, at the times of their ministrations, with a view to its enactment by Parliament, and (b) to frame, with a view to their enactment by Parliament, such modifications in the existing law relating to the conduct of Divine Service, and to the ornaments and fittings of churches, as may tend to secure greater elasticity, which a reasonable recognition of the comprehensiveness of the

Church of England, and of its present needs, seems to demand."

There is much to be said in discussing this recommendation. First of all the word "instructions" appears a little arbitrary, perhaps the word "permission" would more truly express the gist of the Letters of Business. Of course, it may be contended that it follows from the Act for the Submission of the Clergy that this Royal Commission was a method of exercising the visitatorial jurisdiction of the Crown. This Act, however, we must remember, only requires that the royal license or permission is necessary to summon Convocation, and that the royal assent is necessary to confirm what Convocation promulgates. There is no word about the Crown instructing Convocation what it shall and shall not do.

Secondly, we observe that the Commissioners are quite right in admitting that Convocation is the legislative body from which all changes in the Ecclesiastical Law must come in the first instance. Parliamentary sanction is a matter of only secondary importance, to give the authority of the State to what the Church thus chooses to enact and declare.

Thirdly, we emphatically state that what is wanted, is not so much modifications or changes in the law and in the rubrics, as changes in the authority which enacts and interprets the law. We revert again and again to this, because it is really the main object of this book to elucidate and declare it adequately. What the law is, is of secondary importance; the question of questions is, what is

the authority which propounds and interprets it? If it be that of men who are the true spiritual leaders of the Church, all honest men will either obey it, or leave the Anglican Communion, and this, we submit, is all that the most zealous reformers can desire. If, however, on the other hand, as at present, it be that of Parliament and of Parliamentarily appointed courts, many loyal churchmen may conscientiously consider themselves justified in doing neither the one thing nor the other. They will neither obey it, nor will they allow these unfortunate usurpations of authority to override their consciences, and drive them from the Church they love and wish to be truly loyal to.

(3) "In regard to the sanction to be given for the use of additional and special services, collects, and hymns, the law should be so amended as to give wider scope for the exercise of a regulative authority.

"This authority should be exercised within prescribed limits by the Archbishops and Bishops of both Provinces, acting together, for the sanction and regulations of additional and special services, and collects, in accordance with the teaching of the Holy Scriptures and the Book of Common Prayer, and for the forbidding of the use of hymns or anthems not in accordance with such teaching. The administrative discretion of individual bishops within the several dioceses, should be used in conformity with such sanction and regulation."

The Commissioners deal with this question early in their Report (at pages 10 and 11) as follows:— "A claim has been advanced that a power resides

in each Diocesan Bishop to control the public services of the churches in his diocese, and to authorise additions and omissions therein to an extent which no witness has defined, but which is apparently supposed to cover a larger area of immunity from the requirements of the Acts of Uniformity than any construction of the Shortened Services Act would warrant. This right, under the name of 'jus liturgicum,' was claimed definitely by at least two bishops, and less distinctly by another, as a power inherent in the episcopal office which has never been specifically taken away from bishops of the Church of England. . . . A power, which in operation appears to be almost as extreme . . . is exercised by some bishops, who regard themselves as authorised by a wide construction adopted by Archbishop Temple, of the Shortened Services Act, to allow special services and parts of services (e.g., collects) which, although not in terms taken from the Prayer Book, are in harmony with its contents."

But many of their Lordships, while stating their emphatic opinion that the needs of the Church of England make it essential that the Bishops should exercise or continue to exercise some such power, do not claim for it any legal foundation.

"There cannot, in our opinion, be any doubt that the Acts of Uniformity bind bishops as well as other clergymen. . . . At the present stage it is enough to say that . . . it does not appear to us that there is any legal ground for assuming that, apart from statutory provision, the Bishop of a diocese has any inherent right to dispense the

clergy from observing the provisions of these Acts. Such an assumption would, in our opinion, be inconsistent with the constitutional relations of Church and State in England."

To this we reply, that all diocesan bishops have already, if not as inherent in their office as claimed by the three bishops, and (let us add) by many other Churchmen, at any rate by custom, the *jus liturgicum,* in the sense of a power to control and sanction special services, additional to those in the Prayer Book. Reverting to the theoretical difference between what constitutes Ecclesiastical Law in the eyes of canonists and secular lawyers, we see that they have, not by Parliamentary statute, but by what is at least an equally powerful and much more satisfactory ecclesiastical authority in the eyes of Churchmen, that of long accepted usage, the power to make additions in this way in their discretion, to the requirements of the Acts of Uniformity.

How far the power exists beyond these limits, e.g., to abridge the strict requirements of the Acts, is a difficult question to decide. We need not, however, concern ourselves much about this, as the recommendation we are now considering deals only with the question of authorising additional services, hymns, and collects. The power, however, to authorise and control special services is not found in any written law, for the simple reason that it is unwritten or customary law. This, as a matter of common knowledge to Churchmen, has become of almost supreme importance in Church Law. The reason for this, we have already pointed out, is,

that the legislative powers of Convocation have been hampered, and so custom has attained greater prominence as the only method of obtaining that elasticity which is essential to any growth and development.

The Rev. T. A. Lacey* expressly notices that "by custom a bishop may make certain regulations, as in regard to details of divine worship (jus liturgicum) without synodical publicity. It is considered that an order so made lapses with the removal of the bishop making it, while a synodical order continues in force until abrogated."

Mr. Lacey also alludes† to the limit set by a canon of the year 1865, to the obligation imposed upon candidates for holy orders to strictly observe the ritual of the Book of Common Prayer by canons 14 and 16 of 1603. This limit consists in the conditional promise, "In all public prayer and administration of the sacraments I will use the form in the said book prescribed and none other, except so far as shall be ordered by lawful authority." Mr. Lacey adds "This limitation points to future provincial or diocesan legislation, and to the dispensing power of metropolitan or bishop. The effect of the latter is seen in the permission generally accorded to omit certain exhortations which are rather attached to the ritual than integrally incorporated with it. Legislative changes have been effected only by the growth of custom which requires, it must be remembered, the entire

*"Handbook of Church Law" (1903 Ed., at p. 153).
†Ibid., pp. 189 and 190.

even if only tacit consent of the Episcopate. They are seen in the adoption of a new lectionary, and in the introduction of popular hymns to be sung during pauses of the ritual. Apart from changes in the established ritual, the Bishops' jus liturgicum has been actively exercised in the authorisation of additional devotions . . . the power of the bishop in this regard is strictly legislative."

To conclude, we claim that there is a firm basis to the jus liturgicum, not only in the narrower sense of authorising additional services and devotions, but also in the wider sense of abridging or omitting some of the strict requirements of the Acts of Uniformity. This basis may not be a strictly legal one from the point of view of secular lawyers. The *jus liturgicum*, however, exists as valid customary law in the minds of canonists. It is not law from the point of view of the State; it is law from that of the Church.

"(4) Bishops should be invested with power to refuse the institution or admission of a presentee into a benefice who has not previously satisfied the Bishop of the diocese of his willingness to obey the law as to the conduct of Divine Service, and as to the ornaments and fittings of churches, and to submit to directions given by the Bishop in accordance with Recommendation 3."

Again, we say this should not be done by Parliament as the Commissioners mean. Let the matter be left to Convocation, and it would soon be dealt with in a matter that could not be validly criticised, for then the true spiritual authority would lie

behind the new law, which is all that is required to enforce this or any other necessary reform. Parliament could confirm by statute what Convocation does in this way. It is, of course, unfortunately true that even Convocation as at present constituted is far from being an ideal representative legislative body. We do not propose to open up this question, as in itself it is such a wide one; we are content to merely state that fact, which presumably few people would challenge. Nevertheless, such as it is, it is at present our only truly spiritual legislative assembly, and as such is the proper authority to deal with these matters.

"(5) The recommendations of the Ecclesiastical Courts Commission in 1883 as to the constitution of the Diocesan and Provincial Courts, and of the Court of Final Appeal, should be carried into effect with one modification, namely, to substitute, for the recommendation of the Ecclesiastical Courts Commission quoted in paragraph 369 of our report, the following:—

"Where in an appeal before the Final Court which involves charges of heresy or breach of ritual, any question touching the doctrine or use of the Church of England shall be in controversy, which question is not, in the opinion of the Court, governed by the plain language of documents having the force of Acts of Parliaments, and involves the doctrine or use of the Church of England proper to be applied to the facts found by the Court, such question shall be referred to an assembly of the Archbishops and Bishops of both Provinces . . . and the opinion of the majority of such

assembly . . . with regard to any question so submitted to them, shall be binding on the Court for the purposes of the said appeal."

We have dealt already at some length with the matters involved in this recommendation above. It professes to recognise the principle that the Spirituality alone are the proper body to deal with doctrinal and ritual matters. The recommendation is, however, useless, for the Spirituality as represented by "an assembly of the Archbishops and Bishops of both Provinces" are only to be called in as assessors, not as judges, their proper function. Even then they are not to deal with matters which are "not in the opinion of the Court governed by the plain language of documents having the force of Acts of Parliament" which definition includes the Prayer Book and the XXXVII. Articles.

We also wish to point out in this connection that the Ecclesiastical Courts Commission in 1883 expressed themselves in their report as follows, on the matter of the appointment of a permanent body of lay judges as the Final Court of Ecclesiastical Appeal, which they recommended (and which this last recommendation adopts):—"The functions of such lay judges as may be appointed by the Crown to determine appeals is not in any sense to determine what is the doctrine or ritual of the Church, but to decide whether the impugned opinions or practices are in conflict with the authoritative formularies of the Church in such a sense as to require correction or punishment." This was, of course, by way of explanation. Then they add the recommendation (which the present Commission

of 1904 amends in actual words but not in principle) that in cases of heresy and breach of ritual, the Bishops are to be consulted as mere assessors if one or more of the lay judges present demand it. This appears, of course, to be really talking round the point, it is attempting to draw a distinction without a difference. Once again we ask, how can a lay court be said "not in any sense to determine what is the doctrine or ritual of the Church," if it be in fact the Final Court of Appeal in all spiritual matters? The Bishops are in doctrinal and spiritual cases to be assessors, but their opinions may be disregarded by the lay tribunal.

It is noteworthy that five members of the Ecclesiastical Courts Commission dissented expressly from the proviso that the Bishops were only to be consulted if one or more of the lay judges demanded it.

It is much more noteworthy that Sir Robert J. Phillimore, one other of the latter Commission, to his credit went much further, and expressed himself as follows:—"I am unable to concur in those recommendations of the report which suggest that there should be an appeal to the Crown, in other words, that lay judges should decide causes in the last resort, the practical effect of which would be to enable those lay judges to dictate to the Archbishop spiritual sentences which he would have, perhaps contrary to his own judgment, to pronounce."

This statement by Sir R. J. Phillimore not only states the objection underlying the whole idea of a court of lay judges, but it also answers the

attempted excuses of his brother Commissioners for recommending the appointment of a court of lay judges, which they express as follows:— "When we recommend that his [any aggrieved subject of the Crown] appeal to the Crown should be heard by an exclusively lay body of judges learned in the law, this recommendation rests mainly on the fact, that we have provided in earlier stages for the full hearing of spiritual matters by spiritual judges."

Once again, we say, it seems useless for any Royal Commission to appoint a body of lay judges as Final Court of Appeal with the idea that spiritual matters may be dealt with in the courts below.

The supreme Court in all cases rules the subordinate courts, and the latter are bound by the findings of the ultimate Court of Appeal in all cases. Such an appointment, therefore, cannot, to our mind, possibly be justified.

Our contention, viewed from another standpoint, is, that the Ecclesiastical Courts, as a matter of history, derive their authority and jurisdiction from the Church in the first instance. Thus Parliament has no moral right to interfere without the consent of the Church given through Convocation.

We are aware that an answer is advanced to this appeal to history in the statement that the Ecclesiastical Courts, as separate and distinct tribunals, owe their existence to the policy of William I., and that thus the Crown has the right to alter or modify what it has created.

This, of course, is a true statement of fact, so far as the exercise of ecclesiastical jurisdiction through

a regularly constituted tribunal is concerned. The contention founded on it, however, loses sight of the fact that the ecclesiastical jurisdiction existed as a solid fact, before the actual separation of the spiritual and temporal courts under the Conqueror In other words the personal control of the Bishops, i.e., their inherent personal power of government as the Fathers of the Church, is the real source of ecclesiastical jurisdiction. William I. had nothing to do with the creation of this, it has existed from the foundation of the Church, and therefore the Crown cannot, as a matter of abstract right, interfere with the inherent nature of episcopal government. Yet a Court of Final Appeal made up of lay judges, does in fact interfere with the nature of that episcopal government, for it makes that government no longer supreme in spiritual matters, but merely subordinate, a government only in name.

(6) "In all cases in which a sentence of an ecclesiastical court, passed on an incumbent in a suit brought under the Church Discipline Act, 1840, is wilfully disobeyed, power should be given to the Court whose sentence is thus wilfully disobeyed . . . to declare the benefice of such incumbent vacant, and no such incumbent should be eligible for appointment to any other benefice, or to receive a license as a curate or preacher, until he has satisfied the Archbishop of the Province that he will not offend in like manner in future."

The only comment we can usefully make here on this is the obvious one, that if the Church had the self-government to which she is strictly entitled,

the law would be such that no incumbent could disobey it with impunity. The authority behind that law would be Convocation (a spiritual authority) and not Parliament. It would, therefore, have to be obeyed by every man who wished to remain in communion with the Anglican Church. There would be no longer room to challenge the authority behind the law, and whatever might be the position of the offender, he would have to submit, or leave the Church, or at least cease to act as one of her ordained ministers.

Restore to Convocation its full constitutional powers, and there is no point of discipline which it could not adequately deal with without any assistance from the State.

(7) "The Episcopal veto in respect of any suit under the Church Discipline Act, 1840, should be abolished, but it should be open to the Court, in which any suit is brought, to stay proceedings therein (subject to appeal) on the ground that the suit is frivolous and vexatious. . . . The Public Worship Regulation Act, 1874, should be repealed."

In regard to the Church Discipline Act, 1840, which is referred to in the two last recommendations, we repeat what we have said above about it, viz., that it was passed when Convocation was in abeyance, and was an unjustified interference with the inherent powers of the Bishops. It has tended to thrust the Diocesan Court out of its true position in the Ecclesiastical Judicature, and its passing was surely a violation of the terms of Establishment of the Church in this country. In

any case it should be repealed. In regard to the question of the episcopal veto, we have already dealt with the matter fairly exhaustively in the previous chapter.

We have also pointed out above (Chapter II.) that the Public Worship Regulation Act, 1874, really requires no repeal, for it never became law in the eyes of canonists, because it was never received and put "in ure." The Statute has long been a dead letter, and its formal repeal means practically nothing to the Church, although necessary from the State point of view.

It is interesting to note that the Ecclesiastical Courts Commission, in its Report in 1883, at page xlix, in speaking of the Act of 1874, admitted that "it is difficult to see what powers for the repression of offences are conferred by the Public Worship Regulation Act on the Court of Arches, that are not comprehended in those vested in it by the Church Discipline Act, and there is no reason, from a comparison of the two Acts, to suppose, nor has it in practice been found, that any saving either of time or expense is effected by the substitution of proceedings under the latter Act for those under the earlier Act."

(8) "A Bishop should have power at any time, by an order or monition made by himself or by his Chancellor, after due opportunity to be heard on the matter has been given to the incumbent and churchwardens, and any other persons whom the Bishop or his Chancellor . . . may direct, to order the removal of ornaments, objects of decoration, or fittings placed in a church, as to which

ornaments, objects or fittings no faculty has been obtained. . . . ."

(9) "Episcopal and Archidiaconal visitations and Rural Deans' inspection of churches should be more effectively employed, as the regular and official means of keeping the Bishop informed with regard to the conduct of Divine Service in, and the ornaments, objects of decoration and fittings of the churches in his diocese.

"Articles of enquiry in visitation should be framed with a view to elicit this information from the churchwardens. . . . . Directions, in accordance with the law, given by a bishop or archdeacon in visitation, as to the conduct of Divine Service and as to the ornaments, objects of decoration, and fittings of churches, should be enforceable against incumbents and churchwardens by means of summary application to the Consistory Court of the Diocese. Any order thus made should be subject to appeal to the Provincial Court."

These suggestions, so far as they go, are very good, and some of them have, we believe, been adopted in some of the dioceses years ago with considerable success. But the weak spot, of course, consists in the fact that they are made on the presumption that the law as at present promulgated and interpreted is satisfactory, which, we know, is far from being the case. How can a bishop or an archdeacon give, with any hope of success, "directions in accordance with the law," when the authority behind that law is one which the incumbent and churchwardens may refuse to

recognise, and with which refusal the Bishop or Archdeacon may either overtly or secretly be in sympathy?

(10) "For the purposes of effective supervision and administration, it is desirable that many dioceses should be divided, and that a General Act providing machinery for the creation of new dioceses by Order in Council, should be passed, so as to prevent the necessity of the enactment of a separate statute on the formation of each new diocese."

This again is good advice, but nothing new. We now bring our summary and criticism of the Royal Commissioners' Comments and Recommendations to an end. We have quoted from them verbatim at great length, but we believe that no briefer method of dealing with the subject would have been compatible with an adequate and fair treatment of it. We have felt it our duty to state that although the opinions and findings of such an important and learned body of men, thus officially appointed to their work, are entitled to the greatest respect, yet, that we consider (for the reasons given) their findings and recommendations are really practically of little value. We say this with all respect, and after a careful and lengthened study of the whole subject.

They have, as a body, obviously from the gist of their report, viewed the whole matter from the point of view of the State, and the State only. They have acted apparently with the fixed idea that every existing institution and custom which at present professes to bind Church and State

together, has the authority of history behind it, and is strictly constitutional, and must on no account be in any way altered. They thus seem to us never to have gone to the real root of this vexed question of Church and State, and the true meaning of Establishment. They seem, therefore, to have missed the real secret underlying the whole matter, and do not, in their recommendations, touch on the only remedies which can logically be expected to lead to a permanent and satisfactory healing of all wounds.

These may, to some people, sound surprising statements to make. If, however, we have not already piecemeal in the course of this treatise shown the real cause of the present difficulties, and indicated their only true remedies, we shall endeavour at any rate to do so in our concluding chapter, in what we hope is one connected and plainly-stated logical argument.

CHAPTER VI

The Report of the Sub-Committee of the Upper House of Convocation upon the Ornaments of the Church and its Ministers.

THE second Recommendation of the Royal Commissioners, that which directs Letters of Business to be issued to the Convocations with instructions to consider the preparation of a new Ornaments Rubric, has been already partially carried out.

Letters of Business have been so issued, and the Upper House of Convocation of Canterbury appointed a sub-committee in February, 1907, to draw up a historical memorandum on the ornaments of the Church and its ministers. This Sub-Committee has done its work well, and the results of its labours were published in its Report, dated January 23rd, 1908.

This Report is a somewhat voluminous one of 120 pages, and it is a storehouse of carefully-compiled historical information, issued under an authority which all churchmen should recognise, that of the Fathers of the Church, her true spiritual leaders

and legislators. What steps may be taken by Convocation in consequence of this Report it remains to be seen. It, of course, covers but one small heading of the disputes and difficulties dealt with by the Royal Commissioners of 1904. So far, however, as it goes, it is invaluable.

It is quite unnecessary to deal here with this Report in all its details. We give a brief summary of its most important statements as follows:

After a long and exhaustive historical sketch of the origin, development and symbolism of Liturgical Costume, the Sub-Committee express themselves (*inter alia*) as follows:—

"Those who attack the use of liturgical vestments, as well as those who defend them, may be reminded that these vestments have no connection with Levitical dress, that they were simply the garments of civil life, ornamented and beautified, that their shape is strangely simple, because the fashion of dress has altered, and that the symbolism attached to them is arbitrary and fanciful, but at the same time quite innocent and uncontroversial. . . . If vestments are to be 'retained and be in use,' it must be upon the ground that, whilst they are in no sense essential to the validity, or even subservient to the doctrine of the sacraments, they are valuable as exhibiting our continuity with the past life of the Church, and with the whole stream of tradition as to external ornaments which has been accepted in its chief forms in the east as well as in the west, and retained by the Three Lutheran Churches of Scandinavia, as well as (in a certain degree) by our own. Vestments are thus visible

symbols of the antiquity and unity of the Church. What is, however, felt as an objection by the opponents of vestments is mainly to be summed up in two sentences: That they are so closely associated with the Roman Mass that they naturally draw men's minds to its doctrines; and That they mar the simplicity of Divine worship, and still further separate the clergy from the laity."

These objections are both worthy of consideration. The answer to them seems to be that feeling of this kind is entirely a matter of habit, and that if all English clergy wore the chasuble, there would be no feeling about any special type of doctrine attached to it. We know from history that there has been just such a change in public opinion in regard to the general use of the surplice (to which the Puritans violently objected), and we have experienced it, as to the use of the surplice in the pulpit in our own memory, and to some extent as regards the Eastward Position of the Celebrant at the Holy Table.

The second objection, surely, can be met by self-restraint on the part both of clergy and congregations. It is, we believe, right that there should be a distinctive dress for the clergy in their public ministrations, and it is not unreasonable that their dress in the ministration of the Sacraments should differ somewhat from their dress in reading the Common Prayers."

In regard to (a) the *Ornaments of the Church:* (1) Of those which are mentioned in, or implied by, the 1st Prayer Book of Edward VI., the Sub-Committee seem to consider that the following are

illegal, because their use is discontinued, and no longer prescribed under the present Prayer Book—the Chrisom or white vesture for the newly-baptised, the vessel for oil or Chrism, and the Pyx or vessel for carrying the Sacrament to the sick; (2) Concerning those which are neither mentioned nor implied in the 1st Prayer Book, and the use of which depends upon what, for convenience and conciseness, we decided to call "the argument from ancient usage,"* they speak as follows:—

"A claim has sometimes been made that some ornaments at least (together with the ceremonies with which they are connected) not expressly prohibited, may still be used, on the ground that omission is not necessarily prohibition, and that traditional usage is taken for granted in the Prayer Book of 1549. It is true, that in some minor matters . . . . some knowledge of traditional usage is presupposed, and that there are cases where the directions are obviously incomplete; but broadly it appears to be true, that the publication of the Prayer Book in English, involved, so to speak, a fresh start, and that the directions in it were intended to be so far complete as to guide the priest to the words he was to say, and the definite ritual acts he was to perform, and not to permit ceremonies (and together with the ceremonies the "ornaments" used in connection with them) to be employed, unless expressly directed. . . . The general method of abolishing a ceremony and ornament previously used

*Chapter IV. at page 132.

appears to have been by the omission of any reference to them in the prayers and rubrics of that book. Very few usages and ceremonies are expressly prohibited in so many words, . . . whereas for a large number of those previously in use, no direction is given, and the obvious intention of the compilers of the book is that these should not be continued."

They elaborate and support these statements by several arguments and facts. They then express themselves as follows:—

"It would seem to follow from these considerations, as well as from the words of the Acts of Uniformity, that those who compiled the Prayer Book did not contemplate the interpolation of additional ceremonies with appropriate 'ornaments,' beyond those for which provision is actually made in the book; and thus any 'ornament' or article made use of must be honestly subsidiary to the service and not used to introduce a new ceremony."

They then argue that it naturally follows from all this, that such ornaments as the Pax, the Censer (and therefore the use of incense), the Basin for washing the priest's hands (and therefore the ceremony of the "Lavabo"), the Sacring Bell, and the Processional Cross (except when used non-ceremonially), are all illegal.

(b) In regard to the *Ornaments of the Minister*, the Sub-Committee treat the whole subject most exhaustively in strict chronological order.

They finally summarize and discuss all the evidence obtainable as follows:—

"Since the judgment of the Judicial Committee of the Privy Council in the Ridsdale case was delivered in May 1877, the Ornaments Rubric has been the subject of frequent investigations and discussions which have, in our opinion, thrown new light upon it. . . . Some of the facts and arguments to which we have drawn attention were not brought before the Court, and the point of view from which the old evidence is now regarded by historical inquirers, differs considerably from that from which it was regarded more than 30 years ago. The policy and methods of action in ecclesiastical matters followed by Queen Elizabeth and her advisers, are better understood, and it is recognised that their proceedings in the struggle with Puritanism, in the course of which the Advertisements were issued, aimed at securing a minimum of decency and order, rather than compliance in all cases with the full requirements of the law.

"We feel bound to state that our own study of the facts leads us to the conclusion that the Ornaments Rubric cannot rightly be interpreted, as excluding the use of all vestments for the clergy, other than the surplice in Parish Churches, and in Cathedral and Collegiate Churches the surplice, hood, and cope."

(c) In regard to *the Ornaments of a bishop*, the Sub-Committee conclude, that "The word minister throughout these Rubrics (the Ornament Rubrics) includes an archbishop or bishop in his capacity as celebrant or officiant, and that a bishop ought legally to wear at 'all times of his ministration' a

rochet, with either (1) a surplice or cope, or (2) an alb or vestment, or (3) an alb or cope, and to have a pastoral staff. Canon 24 of 1604 enjoins the wearing of a cope by the Bishop when he administers the Holy Communion in a Cathedral or Collegiate Church. It may be questioned, however, whether this prohibits him from wearing an alb and vestment if he prefers it, as the rubric of 1662 is later."

The word "vestment," they add, "implies a chasuble, but any further meaning is uncertain."

They continue:—"The 'rest of the episcopal habit,' which a bishop was ordered in 1663 to put on over his rochet, at the time of his consecration, was probably a chimere with scarf or tippet."

Finally, they say:—"We may add that there has been a practically continuous tradition that the mitre is an episcopal ornament, and that on these lines—(1) heraldic usage; (2) its presence on the head of effigies of bishops in stone and brass, of which a number are extant of the 16th, 17th, 18th and 19th centuries; and (3) its presence in funeral processions, where an actual mitre, or the figure of one, was sometimes carried and sometimes suspended over the tomb."

The Sub-Committee's "General Conclusion" in regard to the Ornaments of the Minister is as follows:—"We believe that the evidence here collected indicates that they cannot rightly be regarded as expressive of doctrine, but that their use is a matter of reverent and seemly order. All questions of legislation, therefore, in regard to

them are questions of expediency rather than of principle."

These few selections and quotations really give what we consider is the gist of the Report, so far as its actual statements on disputed points are concerned. We purposely refrain from making any criticism on it.

The Report comprises, of course, what may be claimed as triumphs by the extremists among both High and Low Churchmen alike.

The partial condemnation of what we determined to refer to as the "argument from ancient usage," and of the contention that omission in the Prayer Book does not necessarily mean prohibition, covers, of course, and would appear, if confirmed, to make illegal, as we have seen, some of the ceremonies and ornaments that may be said to come under the head of ritualism. On the other hand, the recognition of the legality of the much-discussed "vestments" is a great triumph for High Churchmen.

Criticism of this Report is, we consider, out of place at our hands, for our contention all along has been that what the law is, is of secondary importance only, and that the question of questions is: What is the authority which propounds and interprets it?

This Report, it is expressly stated, must be taken as having the authority only of the Sub-Committee by which it was prepared.

That may be so, but it embodies the expert opinions of five of our leading bishops, who, themselves Fathers of the Church, have been selected

for the task by the general body of the Bishops of the Southern Province.

It does not embody the statement of lay officials, or the judgment of a lay court. It is, on the contrary, what we stand in such great need of in our Church, i.e., an authoritative statement of what the law really is on certain disputed points, given by what we asked for (in Chapter V. above) as constituting our only true and satisfactory final court of spiritual appeals, viz.: a select body of the Bishops.

Here at last we have the true spiritual authority speaking to Churchmen. The Report may be open to criticism in many respects; it cannot hope to be perfect and please all people. It has, however (like the Lambeth opinion and the Lincoln judgment), without being the decision of any constitutional or legal tribunal, that true spiritual authority which, we contend, is in itself infinitely better than mere constitutional non-spiritual authority. It therefore should command the respect and loyalty of all true Churchmen as a matter of conscience. If its findings, however, be officially adopted by Convocation, they will become in addition constitutional in form, and so binding in law as well as in conscience.

CHAPTER VII

The Real Causes of the Present Difficulties, and Suggested Remedies.

LET us now try to review the whole of this complex subject of the relationship of Church and State, and the alleged breaches of law, of which both parties to the quasi-contract of "Establishment" have been guilty. We consider, as we have said, that the Royal Commissioners have practically made a failure in their attempts to trace the alleged disorders in the Church to their true causes.

With the exception that, in Recommendation (2) they recognise that the Convocations are the true authorities to change the law of the Church, i.e., that they are the true legislature in ecclesiastical matters; that in Recommendation (5) they admit, by implication (but not by practical application), that the Bishops of the Church are the true Final Judicial Authority in doctrinal and ritual matters; and that in Recommendations (9) and (10) their suggestions in regard to episcopal and archidiaconal visitations, articles of enquiry, and the sub-division of dioceses are practical, if not novel;

they have, we consider, little of any real value to suggest in regard to removing abuses and remedying evils and disorders.

Let us try first of all to substantiate our statement that the Commissioners have failed to trace the alleged disorders to their true source by classifying them ourselves, and showing what in our opinion is the real cause in each case. We have already divided them into two classes, i.e., those which do, and those which do not violate a judicial or quasi-judicial decision.

We preface this further classification by saying that practically every disorder and breach of law on the part of churchmen (as asserted so to be by the Commissioners) of any real importance, is traceable to high-handed and wrongful action on the part of the State, whereby the rights of the Church have been violated, and churchmen driven into revolt as a form of protest.

Our classification of these alleged breaches of law is as follows :—Referring back to Chapter III. we see that, roughly speaking, all breaches of law and irregularities comprised under the headings—(a) Wafer Bread (dating from 12th century)*; (b) Genuflexion; (c) Images; (d) Roods; (e) Vestments (now declared permissible by the Report of the Sub-Committee of Convocation of Canterbury on the Ornaments Rubric); (f) Mixed Chalice (dating from beginning of 2nd century)**; (g) Altar Lights (specifically ordered in the Injunctions of

*Report of Royal Commission on Eccesiasticai Discipline p. 21.

**Report of Royal Commission on Ecclesiastical Discipline p. 21.

Ed. VI. 1547); (h) Making the Sign of the Cross (ancient usage from 4th century at least)[1]; (i) Hiding the Manual Acts; (j) the Introduction of Anthems and Hymns before and after the Consecration Prayer; and (k) the Reserved Sacrament; are breaches of law, as interpreted by the much disliked Judicial Committee of the Privy Council.

On examining this first group of offences more closely, however, we find that only those under headings (a), (b), (c), (d) and (g) are breaches of Privy Council judgments, and of nothing else. Those under (e) are also a breach of the law as interpreted by Lord Penzance's Court; (f), (h), (i), and (j) are also breaches of the decision given by Archbishop Benson in the Lincoln case. On the other hand, (k), though strictly a breach, not of an actual Privy Council judgment, but of what was in reality merely an *obiter dictum*, or an incidental expression of opinion by the Court of the Judicial Committee, is in addition, contrary to the opinion of the Archbishops at the Lambeth Hearing.

To proceed with our classification, the offences comprised under headings—(l) Incense (the use of which dates from the end of the 4th century)[2]; (m) Portable Lights (dating from the 7th century at least)[3]; (n) the Sanctus Bell (with the authority of

1. Report of Royal Commission on Ecclesiastical Discipline p. 23.
2. Canons of Athanasius, sec. 7, 106.
3. Report of Royal Commission on Ecclesiastical Discipline p. 27

ancient usage, dating from the 12th century)**; (o) Holy Water (dating from 9th century)†; (p) the Paschal Candle (used from beginning of 6th century—4 Council of Toledo, can. 9); (q) Observance of Black Letter Saints' Days; (r) Elevation; (s) Confiteor (dating from 12th century)††, and Last Gospel (use of Sarum—ed. Frere, i. p. 89); and (t) the Stations of the Cross, are breaches of the law as interpreted by the Court of Arches. Of these (l) and (m) are, like (k), breaches also of the opinion of the Archbishops delivered at the Lambeth Hearing.

Taking the first great sub-division, those offences which infringe some judicial or quasi-judicial decision, i.e., offences under headings (a)—(t), we have thus seen that they all are, with the exception of (n), (o), (p), (q), (r), (s) and (t), breaches of the law only as interpreted by one or more of the following tribunals:—The Judicial Committee of the Privy Council, Lord Penzance's Court, the Archbishop in the Lincoln case, and the two Archbishops at the Lambeth Hearing; and none of these, we contend, have strictly full authority as, being both *constitutional* and also *spiritual* tribunals, i.e., none of them combine the two essentials of true spiritual authority and official constitutional position.

Headings (n)—(t) we have classified as exceptions, because they all infringe the law, as laid down by the Court of Arches, and by this authority alone.

The Court of Arches, on the other hand, is a

** Report of Royal Commission on Ecclesiastical Discipline, p. 23.
†Ditto, p. 28. ‡Ditto, p. 20.

true spiritual court of full and competent constitutional authority, and so *prima facie* these last-named exceptions appear more reprehensible.

We now take in order these tribunals above-named, whose strict spiritual and constitutional authority we deny.

The Judicial Committee. It has already, we hope, been made fairly plain how frequently and universally the authority of this court has been disregarded, and also, that there are very good reasons for this.

Let us for convenience briefly summarise them:

(1) We have already pointed out that its origin was purely parliamentary, the Church had no say in its creation whatever; Convocation was in abeyance at the time of this creation (1832), and the wishes of churchmen on the subject were not considered or studied by reference to any other of their representatives.

(2) If it be true to say that it was meant to take the place of the Court of Delegates, it has, almost from its inception, gone far beyond the powers of this court, by constituting itself a court of final appeal in purely spiritual matters (i.e. in matters of doctrine and ritual). Whether or not it was meant to exercise the functions of the Court of Delegates, its usurped jurisdiction over spiritual matters is a plain breach of the quasi-contractual alliance between Church and State. This fact is evidenced by the Statute of Appeals (which, we remember, stated that the Spirituality are to decide spiritual matters) by the declaration of Queen Elizabeth (1570), and by the whole history

of ecclesiastical appeals, which we have dealt with already in some detail in Chapter II. above.

(3) The method of its decisions is quite unsuitable to any court which claims to be a final court of ecclesiastical appeal. Its members are not in full sympathy with the true spirit of churchmanship, which begins and ends with the saving of souls, a spirit which the Bishops alone can truly and constitutionally interpret, to the general well-being of the Church. The lay judges apply harsh legal rules of construction to Canon Law, which are quite unsuitable to it, and directly opposite to the principles of theological interpretation; and they are moreover, seldom really learned in the Church Law they are appointed to administer. Their decisions are, furthermore, not above the suspicion of having been dictated by policy, and they are all alike in enforcing a rigid adherence to a particular standard of *ritual* conformity. The court has been on the other hand lax in repressing *heresy*.

(4) Its members are appointed from time to time by a high officer of the State, without any opportunity being given to the Church, through Convocation, to have any voice in the matter. This is, of course, in keeping with the policy which created the court in the first instance.

(5) When the matter is carefully studied, we see that the jurisdiction of the Judicial Committee in doctrinal and ritual cases is the outcome of no conscious act of the State Legislature; of no conscious acquiescence on the part of the Church; but rather, the result of a series of omissions and

unjustified assumptions on the part of the former, and of negligence on the part of the latter.

(6) The bad effect it has had upon all the diocesan and provincial courts is a matter which we have dealt with above.

We may conclude on this point by quoting from Bishop William Stubbs, the most eminent of modern constitutional historians. He wrote as follows:—"The majority of the Commissioners have shown that they regard the Judicial Committee of the Privy Council as a bad court of final appeal. I heartily agree—its constitution and working seem to be alike bad. . . It has worked calamitously for the Church of England, having done more than anything else to promote the growth of Roman Catholic influence; its composition and rules are incompatible with the securing of unbiassed, enlightened and convincing decisions, and the attitude which the Judicial Committee has assumed towards the Church of England, its constitution, and its standard of belief, is a defiance of history and common-sense alike" (Letters 130, 131). This is somewhat strong language to use, but the authority of such an eminent churchman commands respect.

Lord Penzance's Court. This tribunal, as we have already shown (in Chapter II.), had at least as unsatisfactory a nature and origin, and if possible even less claim to ecclesiastical authority than has the Judicial Committee.

We may, perhaps, notice that whereas the Judicial Committee was created by a statute passed when Convocation was in abeyance, and so

could not be consulted, the Public Worship Act, 1874, which created Lord Penzance's Court, was passed in spite of the declared opposition of Convocation, which had long before been restored to actual corporate existence. The case against the latter court is therefore so much the stronger.

The Archbishop's Tribunal in the Lincoln Case was not a regular constitutional Ecclesiastical Court. Though entitled to the highest respect, and, as one would suppose, binding on the conscience of loyal churchmen, its judgments could, as a matter of strict law, only have the value which attached to the personal opinion of the highest dignitary of the Church, delivered unofficially. The hearing was quite an unique and irregular proceeding without any real official authority.

The Lambeth Hearing. Precisely the same objections and criticisms may be urged against the Opinion delivered by the two Archbishops in 1899. The only value this opinion possesses is that which the mature and carefully-considered opinion of these two Archbishops must of necessity have, from our knowledge of their personalities. It has a moral value alone; it has no official or legal value.

It seems clear, therefore, that none of the offences under headings (a)—(m) inclusive, are strictly breaches of law as interpreted by a regular, historical, constitutional, spiritual court.

In respect to offences (n)—(t) inclusive, all of which infringe some decision of the Court of Arches, which, alone of all these tribunals, has

both official constitutional position and also spiritual authority, we make the following answer.

It is an answer which the Commissioners of 1904 themselves supply us with; we therefore quote from their Report, at p. 67, as follows:—"The failure of the court of final appeal to command the obedience of the clergy is a source of inevitable weakness in the provincial and diocesan courts. It is objected that these courts are bound to adopt the rulings of the Crown Court, which hears appeals from them, and that decisions of the provincial and diocesan courts, based on judgments of the Judicial Committee, cannot logically be accepted by those who repudiate the authority of the latter in spiritual matters. Further, although there are many points connected with the law of public worship as to which, there having been no decision of the Judicial Committee, the provincial and diocesan courts may be said to have a more or less free hand, yet the clergy, who do not accept the authority of the Judicial Committee, complain that if these courts decide in their favour the case may be carried by their opponents to the Judicial Committee, where conscience forbids their appearance, while if the provincial and diocesan courts decide against them, they have no court to which, without sacrifices of principle, they can carry an appeal."

In other words, the existence of an unconstitutional non-spiritual *final* court of appeal poisons the whole system of the ecclesiastical judicature in the eyes of those who repudiate its authority.

The final court in all cases must really legislate

for the courts of first instance; the inferior courts are, as the Commissioners say, "bound to adopt the rulings of the Crown court which hears appeals from them."

Many churchmen, therefore, feel that they must give up as hopeless the whole ecclesiastical judicature as at present constituted (including, of course, the Court of Arches). They consider that until it be remodelled upon a reasonable basis, they are free, and indeed are compelled, to decide matters of doctrine and ritual for themselves, by the light of conscience alone.

We now come to our first main contention which we claim to have already adequately supported. It is this:—*All alleged breaches of Church Law, which are breaches of actual judicial decisions of any kind (whether of recognised constitutional ecclesiastical courts or not), that is, all offences under headings* (a) *to* (t), *are traceable, directly or indirectly, to the fact that the Judicial Committee of the Privy Council is an absolutely unsuitable final court of appeal in "spiritual" matters, and that any such jurisdiction, if exercised, is usurped and "ultra vires."* If a new final court of appeal for such causes were appointed in a proper manner, with true spiritual authority, its decisions would be respected by and binding on the consciences of all loyal churchmen. All these and similar offences would then cease, for they would all be either sanctioned or forbidden by an authority which all churchmen must recognise, and the law being interpreted by the proper authority (that of the Church) would be obeyed. So far, in a sense, the

Royal Commissioners may be said to be in agreement with us; for they admit in plain language the unsuitability of the Judicial Committee.

We, however, differ greatly from them in our ideas of what would constitute a final court of appeal which would command the obedience of all.

Now for a specific discussion of our second main sub-division of offences, i.e., those under headings (1)—(36) inclusive, upon which no judicial decision or opinion has been given.

We wish again to point out that of these offences (1) The Lavabo, (though now condemned by the Sub-Committee of Convocation of Canterbury); (2) Washing of Altars; and (3) Exhibition of Consecrated Wafers or Bread with words "Behold the Lamb of God," etc., are *at the worst* unauthorised ceremonial additions to the Prayer Book requirements.

Ceremonial observances are, when all is said and done, merely relative matters, which depend very largely upon time, place, character and fashion, and are always in a state of flux.

Moreover, the Lavabo has the authority of antiquity. In the Report of the 1904 Commissioners we read in paragraph 112:—"In the third century there are traces of a custom of washing the hands as a preparation for prayer on the part of all Christians, and from the fourth century onwards it appears to have been usual for the ministers at the Communion Service ceremonially to wash their hands before the more solemn part of the service as a symbol of inward purity." The ceremony is certainly not mentioned in our Prayer Books, but

to contend that *every* lawful detail of the service must be expressly mentioned is probably quite wrong, as we have endeavoured to show in our discussion in Chapter III. above, about the authority of the rubrics.

We there gave familiar examples of the truth of this statement by referring to the custom of turning to the East in reciting the Creeds, and other similar instances.

The latter custom is, it is possible to contend, quite as much a ceremonial addition to the express requirements of the Prayer Book as is the Lavabo.

The Lavabo is mentioned, as a matter of course, as a legal part of the Holy Communion service in the Rev. Percy Dearmer's "Parson's Handbook" (1903 edition, at p. 329). In the preface to this book the author of course asserts that the amount of ritual which is compatible with loyalty to the Church must be a matter of opinion.

Yet who can take it upon himself to deny off-hand the truth of this statement that the amount of ceremonial which is compatible with loyalty to our Church must be, in the present state of the law, a matter of opinion?

We have discussed the true meaning and legal effect of rubrics; we have seen that "omission" in the Prayer Book does not *necessarily* mean "prohibition"; we find that certain condemned ceremonies (such as this of "the Lavabo") have the authority of antiquity to support them, taking their origin from the earliest days of the Church; we know that the true legislature of the Church (the Convocation) was at one time in abeyance for more

than 100 years, and lost its true position as a legislating body more than 200 years ago. We know, moreover, that the Church of England has been and must be comprehensive in its nature and not narrow, and yet that its written law has remained almost unaltered for centuries through this very stifling of the powers of its true legislative. We know finally that to counteract this, Custom (when sufficiently established) has become to churchmen a matter of primary importance. Who then can say with any confidence that it is impossible, or even that it is improbable, that any churchman can honestly consider that the amount of ritual compatible with loyalty is mainly a matter of opinion?

On the contrary we say that an impartial consideration of the subject leads to the practical certainty that it must at present be unfortunately largely a matter of opinion. This particular ceremony of the "Lavabo" is a very apt illustration of the fact, for there is at present no authoritative act of legislation and no judicial decision upon its legality or illegality, and it has the authority of antiquity, so its user or non-user must be a matter of opinion, until a satisfactory and authoritative decision can be made in reference to it.

Finally, it is impossible to go much further than this in regard to the Lavabo and similar ceremonial observances, which can be traced back to the early days of the Church. We can refer to "the argument from ancient usage." It has been, therefore, up to the publication of the Report of the Sub-Committee of Convocation in 1908 on the

Ornaments Rubric, and if that Report be not adopted, it still will be quite possible for loyal churchmen to believe that this principle (condemned years ago in a time of comparative ritual ignorance) is the true one, and to act upon it, without incurring the stigma of being law-breakers.

The ceremonial of washing of the altar on Maundy Thursday has also (as the Commissioners admit) the authority of antiquity back to the 7th century, and so the argument from ancient usage, if still tenable, applies to it.

The author of the "Parson's Handbook" quotes from the Sarum Missal in support of this custom. There is, of course, no mention of it in the Prayer Book, but equally there is no prohibition of what is undoubtedly an ancient custom, taking its origin long centuries before the English Reformation.

The custom of exhibiting the consecrated wafer or bread with the words "Behold the Lamb of God," etc., has, however, no authority from ancient usage. It is merely a copy of the ritual directions of the Roman Missal, and is really indefensible on any grounds, except that it is a signal to indicate to the intending communicants that the time to receive the sacrament has arrived.

Breaches of law under headings (4) the Blessing of Palms, (5) Tenebrae, (6) Harvest Festivals, etc., (7) Mass of the Prae-Sanctified, (8) Benediction with the Sacrament, and (9) observance of Feasts not in the Kalendar, we have already classified as unauthorised services. All of them would pre-

sumably come under the heading of additional services, which require the Bishop's express consent, if they are to be justified at all, and which are quite illegal without such permission.

We note, however, that the "Blessing of Palms" has (as the Commissioners admit) the authority of antiquity dating at least from the 8th century. The service is described at some length in the "Parson's Handbook" as being one in vogue under the Sarum use before the Reformation. The argument from ancient usage, if still tenable, therefore applies in this case also, for its use has never been expressly abolished.

The service of Tenebræ has, according to the Commissioners' Report, been in use since the eighth or ninth century. It is found in the Sarum use. The argument from ancient usage would apply to this service also.

We note that offences under heading (6) include infringements of sec. 3 and 4 of 35 and 36 Vic. c 35.

The Mass of the Præ-Sanctified was, as the Commissioners say, "certainly customary in both East and West in the 7th century, and may possibly have obtained as early as the fourth. The 'Missa Præ-sanctificorum' on Good Friday is a marked feature in the Sarum Missal." The argument from ancient usage would seem to apply to this service, but the service, of course, would be an infringement of the Lambeth opinion of 1899 in regard to Reservation, which has a moral authority (although not strictly a legal one) which loyal churchmen cannot easily disregard.

The service of Benediction is simply a copy of

the Roman service of the same name; it has no authority whatever from ancient usage, and could not conceivably be sanctioned as a permissible legal additional service by any bishop.

In regard to (9) the Festival of All Souls' Day has been observed as far back as the year 1024 (Royal Commission Report, 1906, page 45).

The Festival of Corpus Christi dates from 1264. Its observance was expressly abrogated by 5 and 6, Edward VI., c. 3 (1906 Report, p. 45).

The Festival of the Assumption of the Blessed Virgin dates at least from the 8th century (1906 Report, p. 42).

All alike were omitted in all the Prayer Books, but neither the observance of All Souls' Day nor of the Assumption is expressly forbidden, and in both these cases the argument from ancient usage would therefore apply.

The Festivals of the Espousals of the Blessed Virgin and of the Sacred Heart have absolutely no authority in antiquity.

Offences under headings (10) Hymns and Prayers to the Virgin and Saints we have dealt with above (Chapter IV). Article XXII., as we have seen, does not forbid the prayer "Ora pro nobis," nor the practice of Comprecation.

The Commissioners admit that these do not come under the Romish doctrine—concerning the invocation of Saints.

(11) and (12) The omission of the "Invitation," the Creed, the Gloria, or the Blessing, is of course unjustified, except on the grounds that the omission of the Creed and the Gloria is merely a following

of the mediæval use, and also that under the first Prayer Book both these omissions were expressly permitted.

(13) Habitual Compulsory Auricular Confession calls for no further comment, save that it is contrary to the teaching and practice of the Church of England and that the Encyclical Letter issued at the Lambeth Conference in 1878, which forbids Confession in any form, though it has strictly no constitutional legislative value, is nevertheless entitled to the greatest possible respect, as the practically unanimous opinion of nearly 100 bishops of the Church. Its moral authority cannot therefore easily be disregarded. On the other hand, voluntary auricular Confession is of course quite free from all these objections and is plainly taught in our Prayer Book.

(14) Services held in connection with the Guild of All Souls seem to be, at first glance, infringements of Article XXII., which condemns the Romish doctrine of Purgatory, but they are not by any means necessarily so. They are of course unauthorised by the Prayer Book.

Prayers for the rest and refreshment of the souls of the faithful departed have the authority of antiquity, and date from the earliest days of the Christian Church. The Commissioners admit that "the Church of England has never formally condemned prayers for the dead."

We may conveniently refer to Dr. Gibson's "Thirty-nine Articles of the Church of England." We read (at p. 545 of the 3rd edition): "There can be no doubt that the whole Church, from the very

first, practised and encouraged prayers for the departed. . . . Nor does prayer for the departed by any means involve of neccessity a belief in purgatory. Indeed many of the prayers of the early Christians are quite inconsistent with it, for they include petitions for the Blessed Virgin and other great Saints, of whom no one would venture to maintain that they are in purgatory."

We therefore conclude that there is little or nothing under this heading which (in the absence of a plainer authoritative declaration of the mind of the Church of England) can be classed as a plain and unjustified breach of law.

(15) Solitary Masses, on the other hand, are quite unjustifiable. As the Commissioners in their report (at p. 34) say, "There is nothing as to which the condemnation of English Church writers of the latter part of the 16th century was more emphatically or frequently expressed than the practice of private or solitary Masses." They are plainly breaches of the express words of a rubric of the Prayer Book.

(16) The non-user of the Athanasian Creed the Commissioners deal with separately, because they have been unable to place it as either a significant or a non-significant breach of law. We have commented upon this fact in the preface. We only wish to add now, that in the present state of the law, there seems no justification for this breach of the plain words of a rubric, on an important matter, save that of long-continued liturgical custom. It is very doubtful, indeed, whether such a custom of non-user has been in any sense so

general, or of such long standing as to give any real grounds for disobedience.

All offences under headings (17)—(36) inclusive, are admitted by our critics, the Royal Commissioners, to be "non-significant breaches of the law which do not appear to have any significance beyond that which directly belongs to them as showing a disregard of the exact requirements of the law," and we accept this as correct. They are all practices which show a tendency to override, by addition or omission, the rubrical directions of the Prayer Book by the cogent factor of liturgical custom. This method seems inevitable under the conditions now prevailing, and is the outcome of the hampering interference of the State with the legislative powers of the Church.

They are subdivided by the Commissioners as follows:—(17) Omission of exhortations in Communion Office, (18) Publication of unauthorised notices; (19) and (20) Railful administrations, (21) Addresses in Confirmation Services, (22) Reading by Deacon of parts of services directed to be read by a priest, (23) Collections, and (24) and (25) Benediction at the end of Evensong or at the end of the Ante-Communion Service, are practices "adopted on the ground of convenience."

Those under (26) Omission of Daily Services, (27) Omission of Services on Ascension Day, and (28) on all Holy Days (other than the Four Great Festivals), (29) Omission of notices of Holy Days and Fasting Days, (30) Omission of the Church Militant Prayer, (31) Disregard of Rubrics about times for administering Baptism, (32) about

Catechising, and (33) about giving notice of Communion, and having Godparents as witnesses of Confirmation, are described as "practices which have resulted from negligence or inadvertence."

Whilst (34), (35) and (36), i.e., Omission of Ante-Communion Service, Repetition of "Thanks be to Thee, O God," after the Gospel, and the placing of elements upon the altar before the service begins, are "practices which have become common from reasons less easy to define."

All attempts to classify these latter headings must necessarily be somewhat arbitrary, but on the whole, as all of them are admitted by those who have been officially appointed to judge the matter to be non-significant, we can safely accept the classification as convenient.

We might perhaps point out that (21), (23), (24) and (35) are only breaches in law, if "omission" in the Prayer Book necessarily implies "prohibition," which, at any rate up to the publication of the Report of the Sub-Committee of the Convocation of Canterbury on the Ornaments Rubric, was extremely doubtful.

Heading (33) comprises faults for which the laity are principally responsible, and not the clergy, and (32) is hardly a breach of law at all, because Canon 59 expressly provides how and when the catechising mentioned in the rubric is to be done, namely, upon every Sunday and Holy Day before Evening Prayer for half an hour or more. This Canon is almost universally obeyed as far, at least, as the Sundays are concerned.

We have taken some pains to show all possible

grounds of justification for this second group of offences (1)—(36). Without committing ourselves to a definite support of any of them, we claim to have demonstrated that (with the exceptions of: The Roman Benediction Service (one case), Compulsory Auricular Confession, Solitary Masses (14 cases), and the observance of the Festivals of Corpus Christi, the Espousals of the Blessed Virgin (one case) and the Sacred Heart (one case) it is not impossible for conscientious people to believe that all of them have some grounds of justification.

More particularly we put it, that with the exceptions given above all these offences are either "non-significant," and are simply necessary attempts to modify inelastic law by liturgical custom, or else they have the authority of antiquity to support them, It is therefore possible for advanced churchmen to conscientiously believe, in regard to these last, that they are justifiable by the "argument from ancient usage," mentioned so often before, and so not illegal.

Under this view of the facts, it is seen that *deliberate conscious infringement of a plainly indicated authoritative statement of what is lawful is confined to the exceptions given above, and consequently very rare indeed.*

This is an important point, as it helps our main contention.

It is thus quite possible that all the alleged offences (1)—(36), (with the few exceptions above-mentioned) may be conscientiously regarded as justifiable on some ground or other, until an absolutely constitutional spiritual Ecclesi-

astical Authority, which is binding upon the consciences of churchmen, declares in unmistakable language that they are in fact breaches of law.

This can only be done by having a judicial interpretation of the law by a satisfactory ecclesiastical court of final appeal, as indicated before, or (more especially in regard to this second group of offences) by further necessary legislation on all the controversial points by Convocation as the true ecclesiastical legislature.

The Commissioners admit the constitutional principle, that Convocation is the true legislative body for the Church, but they apply the principle most imperfectly in their recommendations.

For example, in Recommendation (2), instead of giving, as they do, instructions to Convocation to modify certain specific matters, to be afterwards confirmed by statute, they would much more usefully have recommended that the old constitutional rights of legislation inherent in Convocation, and usurped in modern times by Parliament, should be restored in their completeness.

Convocation would then be in a position to make all such alterations in the existing law as they, in their unhampered discretion deem necessary, and at such a time as they think most conducive to the true welfare of the Church.

Nothing less than this would seem likely to satisfactorily dispose of all the vexed questions arising out of the alleged offences under the headings (1)—(36).

We now come to our second main proposition, which we state as follows:—Just as the alleged

offences under headings (a)—(t) are all traceable, directly or indirectly, to the present chaotic state of the ecclesiastical judicature, due to the interference of a lay court with spiritual matters, so *the alleged offences under headings* (1)—(36), *(with the few minor exceptions above mentioned) are all traceable to the fact that Parliament has usurped and hampered the legislative powers of Convocation to such a degree that Church law has become inelastic and out of date.*

The immediate result has been that liturgical custom has done in a somewhat irregular manner what Convocation should have been permitted to do, in the ordinary exercise of what should be its principal function, by altering the existing canon law to meet the liturgical requirements of changing years.

Let us now sum up the whole matter and gather in the threads of all our arguments.

We have taken pains to demonstrate that the Bishops are the true historical and constitutional governors of the Established Church in this country, by being themselves the members of its Judicature and its Legislature.

We have done this in order to meet the secular lawyers on their own ground, and we claim in doing so to have fully established our arguments.

We can, however, in the last resort, if necessary, abandon the appeal to constitutional history entirely, and take our stand upon the broader Catholic Principles of Church Government. We can assert (without fear of contradiction) that the Bishops, and the Bishops alone, as the Fathers

of the Christian Church, have as inherent incidents of their office, from which they cannot free themselves even if they would, all the powers of government of the Church, both legislative and judicial, as well as pastoral and administrative.

Now to apply this principle to the Church of England, i.e., the English sub-division of the Anglican branch of the Christian Church.

If the Church of England had her own court of final appeal in spiritual matters, i.e. a selected bench of her bishops, against whose decisions no churchmen could have a shadow of a claim to protest, and also her own legislature, i.e., her bishops again, sitting in their Convocations (to declare between them by judicial interpretation and promulgation of canon law, in definite unmistakable language, what the law on disputed and uncertain points really is) then all irregularities would surely cease.

They would cease for the following very good reasons:—The diocesan bishops would then be in a position to deal with law-breakers in a very simple manner. They would (by thus having spiritually authoritative declarations of what the law is) know exactly whether or not it had been broken in each individual case. As things are at present, neither high churchman nor low churchman, bishop nor priest, knows absolutely what the law really is on many points, and in consequence, many bishops are, openly or secretly, in sympathy with the alleged law-breakers. The Bishops could then give a law-breaker a plain choice, either to obey the law as thus authoritatively declared, or

to leave the Anglican Priesthood. All former excuses and justifications would be no longer existent, and the difficulty of getting rid of a disobedient incumbent would presumably have been dealt with by legislation through Convocation.

The possession by the Church of her own judicature and legislature, and the necessary limitation of the exercise of the Royal Prerogative in regard to both would, for the reasons given, put an end to all ritual and doctrinal irregularities in time. There still remains, however, the third point, the appointment of bishops, in regard to which, as we indicated in Chapter II. above, the Royal Prerogative has been unconstitutionally extended.

This branch of the Royal Supremacy is now exercised through the Prime Minister, a method which leads to injustice.

There is another outcome of the fact that the Royal Supremacy over the Church is now exercised through Parliament.

The attempted justification for this is, that power has now passed entirely from the Crown to Parliament in this country. But the Royal Supremacy over the Church has never meant (not even in the time of Henry VIII.) the Supremacy of Parliament over the Church. It is, however, plainly evident, that if Parliament is now to take the place of the Crown in this way, it can only rightly do so on the distinct understanding that it must exercise these prerogatives of the Crown in a strictly constitutional manner. We might add also the obvious fact that the powers of secular government in this

country have only passed from Crown to Parliament with the express consent of the nation, i.e., of those who are to be governed. How, then, can it be fairly contended that the powers of ecclesiastical government (so far as included in the Royal visitatorial jurisdiction) should pass from Crown to Parliament without the consent of, and in face of the protests of, those governed, i.e., churchmen? Yet this is precisely what has happened.

Moreover, these powers or prerogatives of the Crown have never been properly exercised since their usurpation. We see the result, not only in the appointment of our bishops by Prime Ministers, who may be under the political influence of those who are actually hostile to the Church, but also in the fact that Parliament has itself usurped the right of legislating for the Church, and (as a principle example of such legislation) has appointed a secular tribunal as her court of final appeal. Such a court, we add, might have been free from serious objection had it confined its operation to the limits of the jurisdiction its creators planned for it, or which its predecessor, the Court of Delegates, possessed. It has, however, usurped authority over purely spiritual causes.

We shall now restate the gist of our more important arguments, in the form of a recapitulation and a *final proposition,* as follows:—

We have contended, that the meaning of the Establishment of the Church of England is, that there exists between the Church and State an unwritten (but not the less definite) quasi-contractual alliance.

Under the terms of this alliance the Church's Officials and Courts are recognised officially as being part of the organisation and administration of the State. The Church herself has other privileges (including that of the tithe rent charges upon agricultural land) on condition that the State (through the Crown, not through Parliament) has a general right of visitatorial supervision over the Church's Legislature and Judicature, and the right of appointment of her bishops.

The right of supervision, so far as the Church's legislature is concerned, consists in the fact that the Royal License and Royal Ratification are essential to the legality of all Canons promulgated by Convocation.

So far as her judicature is concerned, it consists in the fact that the State has the right to supervise the Church courts as part of the State judicature, by way of appeal *tanquam ab abusu*, to see that they do not violate the general law of the land (which binds all the King's Courts), or by way of "prohibition," to see that they do not exceed their jurisdiction, and also by writ of "mandamus," to compel the exercise of their jurisdiction, if it be wrongfully withheld.

This general visitatorial supervision does not include any right, either to interpret ecclesiastical law judicially by hearing appeals, or to legislate for the Church *in the first instance* through Parliament.

These terms of Establishment have been broken by the State in all three branches of the Royal Prerogative as follows :—

Parliament has usurped the legislative rights of Convocation, and repeatedly legislated for the Church in the first instance, instead of merely giving statutory confirmation to the Canons of Convocation.

Parliament has appointed a lay court of final ecclesiastical appeal, which has usurped authority over purely spiritual causes.

The Prime Minister (*pro. tem.*) now appoints successors to all the vacant sees.

To these three facts, we contend, are attributable *all* disorders in the Church, *all* alleged breaches and irregularities in the law, with a few trivial exceptions in the case of irreconcilables, and *all* the failures of the Church to herself remedy her defective administration.

Our final proposition, therefore, is as follows:—*Let the State give back to the Church of England her own inherent and historical rights of constitutional self-government, i.e. her powers of legislating for her own affairs, and her own power of deciding spiritual causes in the last instance, and all disorders will end. There will then soon be no more talk of the law of public worship in the Church being "too narrow for the religious life of the present generation" or of the "machinery for discipline" having "broken down."*

The law of public worship has become too narrow, simply and solely because the State has suppressed Convocation, and finally usurped those powers of legislation which (had they been left to Convocation) would presumably have effected the

necessary changes in the law, which the lapse of time has made necessary.

The machinery for discipline has broken down because the State has interfered with it, and taken it out of the hands of the Bishops, its only true administrators. One of the principal methods by which this has been done has been to take the final judicial interpretation of the law out of the hands of what we contend are the true supreme judges of the Church (the Bishops) to place it under the control of lay judges.

The issue seems thus a plain and simple one;—if the State will in the future adhere strictly to the terms of the Church's alliance with it and undo the faults of the past, all will be well. If, however, it refuse to do so expressly, or impliedly, by confusing the real issue, by trying (as these last Commissioners do) to shift responsibility, or by suggesting remedies which are on closer examination seen to be no remedies in fact, the Church can logically only take one road, and that is, the road to Disestablishment. In other words, she must herself end her formal relationship with the State, the terms of which the State will not keep, and under which she now gains so little and loses so much.

We are quite aware that much that is quite inaccurate is said about Disestablishment, and also that it is a subject at which many churchmen, through ignorance of its true meaning, take needless alarm.

We therefore venture, having thus stated the logical outcome of our arguments, to refer back to

our statements in regard to the meaning of Establishment, and then plainly put down the full meaning of Disestablishment.

The privileges of Establishment, so far as they have any importance whatever, we classified above (Chapter I.), as consisting of the following facts: (1) Some of the Bishops are members of the House of Lords: (2) The existence of tithe rent charge in some rural parishes: (3) Secular recognition of Church officials and dignitaries: (4) and (5) Church law is part of the law of the land, and the decisions of Church Courts are recognised, and can be enforced, by the secular arm.

Of what practical and spiritual value to the Church is official recognition? In regard to seats in the House of Lords, we repeat that strictly they do not come under the heading of a privilege of the Established Church, because the Bishops hold their seats originally, as barons by writ, and because the Clergy of the Church of England cannot sit in the House of Commons; so then the bishops are in an ecclesiastical sense their only representatives in the Secular Parliament.

We do well to remember also that as a matter of fact the ascendancy of the temporal peers over the spiritual peers only dates from the time of the suppressing of the monastic houses. Before that the spiritual peers were the more numerous.

Of what value is the secular arm in enforcing ecclesiastical judgments and censures? We have had examples of the unsuitability of secular punishment in the ritual cases of the last genera-

tion. The Church can only rule in the consciences of her children.

Thus we see, that of these privileges (2) the tithe rent charge is the only one which can really be said to be of any practical and substantial value to the Church of England. It, moreover, is purely a monetary matter, and as such should surely not be weighed in the balances against the inestimable privileges of Freedom, Self-government, and Self-administration. Nor can it be regarded as in any sense an adequate compensation for the injustice of State interference, State legislation, and State control. This is plain speaking, but we consider the facts justify it.

The plain truth is, that the Church is paying a heavy price, in the form of loss of liberty and self-government, for a few formal privileges of practically little value, and one substantial privilege of merely financial concern. The Church therefore seems, in theory, to have little really to lose and much to gain by Disestablishment, and so can afford to assert and maintain her freedom by this course, if it cannot be obtained amicably otherwise. She has been too long under the maladministration of Parliament, and it can only be by a bold assertion of her rights, by a plain statement of her true position, that she can hope to entirely free herself from it, and rule herself.

We are, of course, aware that Parliament is supreme in the sense of actual power, and it is not absolutely inconceivable that it would admit no sin, not even that of Confiscation. As a matter of

plain justice, however, and abstract right (which, of course, are the only things to which men can appeal with the hope of unfailing ultimate success) it would seem that the only part of the financial resources and endowments of the Church of England, which she can be called upon to forfeit in case of Disestablishment, is the tithe rent charge. This must, of course, also include a minor item in the capital amounts at present held by the Ecclesiastical Commissioners under the Act of 1836, as the agreed commutation or redemption money of any pre-existing tithe rent charge.

This, and this alone is, we contend, the *legal* connection between Disestablishment and Disendowment. The retention of the funded benefactions, churches, parsonages and other ecclesiastical property is, in no sense whatever, legally or morally contingent upon the Church of England continuing to be the Established Church.

There are, on the other hand, in addition to the great privilege of freedom and self-government, certain distinct minor advantages in Disestablishment which cannot be ignored. Such as the fact, that under the new system, many of the parochial organisations, which are at present left to be maintained by the incumbent, would be adequately supported by the laity; moreover, the burdensome question of dilapidations would cease to exist.

We have not alluded to the fact that Disestablishment might mean a spiritual loss to the nation as a nation. This for the excellent reason that we consider the Church of England would not be weaker nor have less grip or hold upon the nation

than before. Possibly even quite the reverse might be found to be the case, for being unfettered and free the Anglican Church could hardly fail to be a stronger spiritual factor in the country's welfare than before.

We are, of course, aware that there is much outcry at present among the extreme churchmen of both classes, high and low alike, at any attempted drastic solution of present problems. More particularly we are told that the present time of unrest and controversy is not the time to carry out the Recommendations of the last Royal Commission.

The truth of the matter appears to us, however, to lie in the fact that it is not the present time which is unsuitable for reform (for no time can be really unsuitable to introduce reforms) but that the reforms suggested by the Royal Commissioners are, as we claim to have shown, largely futile and almost entirely miss the root of the evil. In other words, the fault does not, in any degree, lie with the Church except in so far as she has been slow to maintain and assert her rights, but entirely with the State. We have pointed out the possible logical necessity for Disestablishment coming from within the Church (it may come, of course, from without). We hesitate to advocate it in so many words. We note, however, that it seems to have worked very well in Ireland. Among the most noticeable matters upon which a great improvement seems to have been effected there is that of the patronage of livings. Surely the present system of private patronage in this country cannot compare favourably with the new official system

of patronage now in vogue in Ireland. This much, however, we conclude with, viz.: that it is quite certain that no fear of Disendowment, Confiscation or loss of official privilege should deter the Church from maintaining her rights, even at the cost of Disestablishment. The policy of "peace at any price" never yet gained any real advantage or concession in the whole history of the world for any individual or community, in either secular or ecclesiastical matters.

THE END